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In The Supreme Court of the United States

SANDRA J. DAVIS; VELINA B. DUNCAN; ROSE BROWN; AND ANNETTE AMICK,

Petitioners,

v.

VALLEY HOSPITALITY SERVICES, LLC,

Respondent.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Eleventh Circuit

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED FOR REVIEW

Should class action be certified and summary judgment denied when the Equal Employment Opportunity Commission was put on notice and demonstrated to the district court of a wide spread discriminatory pattern and practice of discharging managers, front desk employees, and older employees who did not have the "right look" which had a disparate impact and systemic discrimination pretextually discharging the Petitioners as well as virtually all older and African American managers and predominately replacing them with Caucasian and younger employees?

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The Opinion of the United States Court of Appeals for the Eleventh Circuit, November 30, 2006, reversing the district court's denial of summary judgment on the cause of action of Petitioner Sandra J. Davis is set forth in the Appendix at A-1. The Opoinion of the United States Court of Appeals for the Eleventh Circuit, November 13, 2006, affirming the district court's denial of certification of class action and granting of summary judgment against of Petitioners Velma B. Duncan, Rosa Brown, and Annette Amick is set forth in the Appendix at A-8. The Order of the United States District Court for the Middle District of Georgia, May 31, 2005, denying Respondent's motion for reconsideration of the order denying Respondent's motion for summary judgment with regard to the claims of Petitioner Sandra J. Davis and certifying the issue for immediate appeal is set forth in the Appendix at A-15. The Order of the United States District Court for the Middle District of Georgia, April 25, 2005, granting summary judgment for the Respondent as to the cause of action of Petitioners Velma B. Duncan, Rosa Brown, and Annette Amick and denying summary judgment as to Petitioner Sandra J. Davis is set forth in the Appendix at A-18. The order of the United States District Court for the Middle District of Georgia, June 23, 2004, denying class certification is set forth in the Appendix at A-59. The Order of the United States District Court for the Middle District of Georgia, June 10, 2004, granting the Respondent's motion to dismiss class wide claims under Title VII and denying Respondent's motion to dismiss Petitioner's collective action ADEA claims as well as the individual cause of action of Petitioner Sandra J. Davis' ADEA claim is set forth in the Appendix at A-60.

JURISDICTION

The final judgments of the United States Court of Appeals for the Eleventh Circuit were rendered on November 13, 2006 (A-1) and November 30, 2006 (A-8). The statutory provision conferring jurisdiction on the Supreme Court of the United States to review on a Writ of Certiorari is 28 U.S.C. § 1254.

STATUTORY PROVISIONS INVOLVED

42 U.S.C. § 2000e-2. Unlawful employment practices

(a) Employer practices. It shall be an unlawful employment practice for an employer—

(1) to fail or refuse to hire or to discharge any individual, or otherwise to discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual's race, color, religion, sex, or national origin; or

(2) to limit, segregate, or classify his employees or applicants for employment in any way which would deprive or tend to deprive any individual of employment opportunities or otherwise adversely affect his status as an employee, because of such individual's race, color, religion, sex, or national origin.

29 U.S.C. § 623. Prohibition of age discrimination

(a) Employer practices. It shall be unlawful for an employer-

(1) to fail or refuse to hire or to discharge any individual or otherwise discriminate against any individual with respect to

his compensation, terms, conditions, or privileges of employment, because of such individual's age;

(2) to limit, segregate, or classify his employees in any way which would deprive or tend to deprive any individual of employment opportunities or otherwise adversely affect his status as an employee, because of such individual's age; or

(3) to reduce the wage rate of any employee in order to comply with this Act.

STATEMENT OF THE CASE

This case arises out the acquisition of the Wyndham Hotel in Columbus, Georgia by the Respondent Valley Hospitality on November 1, 2002. Within a few months thereafter, forty African-American employees (half the 80 person workforce) would be terminated and fifteen over forty years of age employees would be terminated as managers, front desk employees, and other employees. In order the give the hotel as well as the hotel restaurant franchised as a Houlihan's restaurant what they termed a "new look," the Respondent terminated African-American employees and protected older employees and then hired replacement managers, front desk employees, and other employees who predominately were young and Caucasian -- hiring only seventeen African-American employees and only two over forty years of age employees, excluding the three top executives brought in by the Respondent. The admitted disparate employment actions of the Respondent and discriminatory pattern and practice resulted in the terminations of the four named Petitioners who brought an Amended Complaint-Class Action for a class of:

> all former and present managers, front desk employees, and other employees who have been discriminated against in the termination of their employment and other terms of

employment on account of race or age at the Wyndham Hotel.

A series of orders of the District Court denied class action certification and granted summary judgment for the Respondent on the terminations of three of the four named Petitioners, Duncan, Brown and Amick, leaving only the individual claims of Petitioner Davis and no injunctive relief.

Three appeals were consolidated before the United States Court of Appeals for the Eleventh Circuit. All named Plaintiffs, Davis, Duncan, Brown and Amick, sought review under 28 U.S.C. § 1292 (a)(1) of the Order of April 25, 2005 granting the Defendant's Motion for Summary Judgment and thereby denying injunctive relief. Notice of Appeal was filed on May 17, 2000, and docketed on June 6, 2005 as Appeal Number No. 05-13107-J. The Court subsequently ruled that Plaintiff Davis' appeal was premature.

Plaintiffs Duncan, Brown, and Amick filed a Notice of Appeal on June 14, 2005 and sought review under 28 U.S.C. § 1291 of the Order dated May 31, 2005 and entered by the Clerk on June 6, 2005 as the Final Order in accordance with FRCP Rule 54 (b) following the Order of the District Court of April 25, 2005 granting Defendant's Motion for Summary Judgment against Plaintiffs Duncan, Brown, and Amick. This appeal was docketed on June 17, 2005 as Appeal Number 05-13342.

Respondent Valley Hospitality sought review of the Order of the District Court of April 25, 2005 denying summary judgment to Defendant as to the cause of action of Petitioner Davis. The District Court granted the Respondent's motion for certification for immediate interlocutory appeal on May 31, 2005. Respondent Valley Hospitality on June 14, 2005 petitioned this Court of Appeals for permission to file the interlocutory appeal relating to denial of summary judgment as to the cause of

action of the last remaining Petitioner, Petitioner Davis. The Petition for Permission to Appeal by Valley Hospitality was docketed as Appeal Number 05-90015.

The Eleventh Circuit affirmed the District Court not certifying class action and affirmed the District Court granting summary judgment to the Respondent Valley Hospitality as to Petitioners Duncan, Brown, and Amick on November 13, 2006 and reversed the denial of summary judgment as to Petitioner Davis on November 30, 2006.

REASONS FOR GRANTING THE PETITION

The Eleventh Circuit in the instant case has departed failed to recognize that *Ash v. Tyson Foods, Inc.*, 546 U.S. 454 (2006) allows a discrimination case to go to a jury where plaintiffs show a combination of statistical significant racial disparities, racially charged statements by the employer and adverse employment actions against more highly qualified members of protected classes. The District Court order and the Eleventh Circuit opinions conflict with the teachings of the recent United States Supreme Court case of *Ash v. Tyson Foods, Inc.* that a plaintiff's prima facie case, combined with sufficient evidence to find that the employer's asserted justification is false, may permit the trier of fact to conclude that the employer unlawfully discriminated.

Further, the Eleventh Circuit in the instant case requiring a verified amended charge overruled their previous precedent in *Grayson v. K-Mart*, 79 F. 3d 1086 (11th Cir. 1996) that notice is sufficient to put the EEOC on alert of alleged class wide discrimination. This holding of the Eleventh Circuit now conflicts with the Sixth Circuit *Howlett v. Holliday Inns, Inc.* 49 F. 3d 189, 194-197 (6th Cir. 1995). The Eleventh Circuit's opinions conflict with United States Supreme Court precedent in *Hazelwood School District v. United States,* 433 U.S. 299 (1977) that gross statistical disparities can be proof of practice of discrimination.

PETITIONERS HAVE BEEN DISCRIMINATORILY AND PRETEXTUALLY DISCHARGED IN A DISCRIMATORY PATTERN AND PRACTICE OF DISCHARGING AFRICIAN-AMERICAN AND OLDER EMPLOYEES AFTER THE RESPONDENT ACQUIRED THE WYNDHAM HOTEL

On the heels of Respondent's acquisition of the Wyndham Hotel, Petitioners were discharged in a pattern and practice of discriminatory termination aimed at targeting and replacing hotel managers, front desk employees, and other employees who did not have the "right look" as well as not hiring replacements who did not have the right look. (Amick deposition, p. 72-73, 154; Davis deposition, p. 108-110, 117, 132, 153; Brown deposition, p. 94, 98; Duncan deposition, p. 92, 104-106).

The Respondents upon acquiring the Wyndham Hotel discharged or demoted the only three African-American Managers, Petitioners as well as demoting Veronica Williams to Housekeeping Supervisor. Petitioner Davis, who also was over forty years of age, had worked from the Wyndham Hotel most of her working life and had been the manager of the front desk for many years. Both Petitioners Davis and Duncan were discharged and on the same day that Veronica Williams who is African-American and over forty years old was demoted from a manager position dealing with the public at the front desk as By Request manager to Housekeeping Supervisor. The Respondent then brought in nine young Caucasian managers, Mark Brown, David Burris, Stacy Piccole, Bruce Raines Franco Brandy, Joe (Executive Chief), Allison (lounge manager), Amanda Fox Front office supervisor (manager), and Stephanie Pezold. These were in addition to Brian Plemmons, the General Manager executive. Respondent thus (1) immediately fired or demoted the three older African-American managers and hired ten Caucasian managers and executives without hiring a single African American Manager (2) terminated four African-American

front desk employees including Petitioner Brown while hiring four young Caucasian replacement front desk employees. Within a few months after the acquisition of the Wyndham Hotel the only over forty years old manager left was Petitioner Amick and she too was soon replaced by two mid-twenties Caucasian females.

The Respondent admits in pleadings that after acquisition of the Wyndham Hotel it discharged forty African American managers, front desk employees, and other employees while only hiring back seventeen African-Americans employees and that the Respondent discharged fifteen employees who were over forty years old while only hiring back five employees who were over forty years old, three of which were the executives that the Respondent brought in. So the Respondent only hired back two employees who were over forty excluding the three executives on the Respondent's executive committee. See Defendant's Supplemental Objection Brief to Plaintiffs' Motion to File Amended Complaint – Class Action note 5.

The Order of the District Court, April 25, 2005, (A-18) summarily dismissed Petitioner's demonstration of before and after comparisons as well as disregarded the Petitioner's own admissions of the gross disparative discharges of Africian Amenican and over forty years old managers, front desk, employees and other employees which clearly demonstrative the systemic disparate treatment. The rationale of the Court that there was no accompanying statistical expert opinion. Petitioners' counsel is unaware of any requirement that disparate pattern and practice can only be proven by expert opinion. There particularly true when the Respondent admitted the gross disparities in their responsive pleadings. Is their a requirement that Petitioners who have been victims of an admitted disparate and systemic pattern and practice of discrimatory discharges that they can only prevail if their can afford to hire a statical expert? Two

of the Peitioners were even driven into bankruptcy because of being discharged by the Respondent.

It is submitted that the district court's Order is strained and unfounded in granting summary judgment the Respondent and denying class certification. That there were disparate and systemic discharges of African-American and over forty years of age managers, front desk, and others employees immediately following the acquisition of the Wyndham Hotel which was demonstrated with credible evidence and even admitted by the Respondent. The District Court's order is similarly stained in granted summary judgment as the age and race discrimination claims of Petitioners Duncan, Brown, and Amick. There was demonstrated evidence of their discriminatory discharges being wholesale replaced by Caucasian and young managers and front desk employees following the similar pattern and practice of discharging employees who did not have the right look. Further, the Petitioners' terminations were pretextual and just not credible.

Petitioner Davis, a 15 year veteran of the company, was terminated from her position as manager of the front desk on November 4, 2002 immediately after the Defendant acquired the Wynham Hotel on the pretext that her position was being eliminated. Respondent told her that there was no comparable position, although the position of front desk supervisor had the identical day to day duties and functions (Davis deposition, p 71-72). The Wyndham Hotel was short staffed on the front desk and had to have day to day management of the front desk. (Davis deposition, p 72). A young Caucasian female, Amanda Fox, was hired as the front desk supervisor who performed the very same day to day duties as the terminated Petitioner Davis. (Davis deposition, 98-99). Petitioner Davis was terminated because she did not have the "right look: that the Respondent new owners wanted on the front desk and conversely Amanda Fox was hired as front desk supervisor and de facto manager

because she had the look they wanted (white and young). (Davis deposition, p 109). Petitioners Davis was unquestionably qualified to manage or supervise the front desk because she had done so for years. Two older African-American managers were discharge and a third demoted from the front desk area to the back of the house as housekeeping supervisor and de facto manager because they too did not have the "right look." (Davis deposition, p 110-112, 116).

That same day, November 4, 2002, Jack Pezold as the owner of the Respondent Valley Hospitality held a news conference and assured that all the employees at the Wyndham Hotel would keep there jobs. (Davis deposition, p 91, 106, 119: Amick deposition, p. 203).The very same day, Veronica Williams, the other African-American manager performing a front of the house function of By-Request manager was taken out of her position and demoted to housekeeping supervisor. (Davis deposition, p 107). All three of the African-American females were terminated or demoted on November 4, 2002 and discriminated against on account of race and age. (Davis deposition, p 109, 132-133, 154-155, Plaintiff's Exhibit 1). In addition the Defendants added ten other managerial employees who were all Caucasians, and no African American Managers were hired. (Davis deposition, p 155, Plaintiff's Exhibit 1).

Respondent's Motions for Summary Judgment contend that the three male Caucasian executives brought in after the acquisition took over the functions of the African-American managers who were immediately terminated. This contention ignores that Petitioner Davis was replaced by a young Caucasian front desk manager, Amanda Fox, who was given the title of supervisor but performed the identical day to day functions as Petitioner Davis. The Respondent's contention also ignores that Plaintiff Duncan was replaced by a former By Request front desk manager whose position had been given to a young Caucasian female and who had

been given the title of housekeeping supervisor but performed the same day to day functions as Respondent Duncan.

The two remaining African-American front desk employees, Glenda Crawford and Tamara Stansell, were assured that they had job security on the front desk by the Respondent's executive Bruce Raines because they had the "right look" and were young and light skinned. (Davis deposition, p 117, Crawford Affidavit). The Affidavit of Glenda Crawford relates the conversation on November 5, 2002 that she and Tamara Stancil were told by Rooms Executive Bruce Raines that their positions on the front desk were secure because they "had the look they were looking for young, petite, medium build, light or fair complexion." (Crawford Affidavit). Subsequently four remaining front desk Africa-American employees were terminated by the Defendant who were Tamara Stansell, Glenda Crawford, Plaintiff Rose Brown, and Carolyn Lewis. (Plaintiffs' Exhibit A attached to Plaintiffs' Response to Motion for Summary Judgment, Crawford Affidavit). The four replacement employees at the front desk were all young and Caucasian, Kristy Clifton, Carol Everette, Jessica Clifton, and Chris Brown (Plaintiff's Exhibit 1, attached as Exhibit A of Plaintiffs' Response to Motion for Summary Judgment). Glenda Crawford observed that while she was employed as a front desk employee that for the next few months following acquisition of the Wyndham Hotel by the Defendant that the persons that were let go were older, darker, and overweight individuals or if they were not let go they were moved out of public view. (Crawford Affidavit).

Petitioner Duncan, the housekeeping manager, was also terminated on November 4, 2002 on the pretext that her position was being eliminated. (Duncan deposition, p 71). She was immediately replaced by Veronica Williams who had been discriminatorily taken off the front desk and was given Duncan's position with the title of housekeeping

supervisor, but performed the same day to day functions a Petitioner Duncan. (Duncan Deposition, p 77, 81). Petitioner Duncan along with Plaintiff Davis, the only two African American managers terminated initially and the other African-American manager Veronica Williams was put in the back of the house replacing Petitioner Duncan's position but demoted to the title of supervisor. (Duncan Deposition, p 79). All the other significant managers were Caucasian. (Duncan deposition, p 79, Plaintiff's Exhibit 1). Veronica Williams' position of By Request manager was discriminatory filled by a young Caucasian female. (Duncan deposition, p 85, 88-89). This all happened on November 4, 2002, the same day that the Defendant's owner assured in the news conference that all employees of the Wyndham Hotel would keep their positions. (Duncan deposition, p 84; Brown deposition, p 81-82). Duncan had proven qualifications as the manager of the housekeeping department, was discharged without the option of housekeeping supervisor or any other position.

Plaintiff Brown, an over forty years of age African-American, was a part time front desk employee who had worked at the Wyndham Hotel for two years. She was ostensibly discharged on the pretext that she had taken a personal check from a guest after receiving proper identification which was in accordance with the long standing policy at the Hotel that was even written in the front desk log book. (Brown deposition, p 68- 70). The Affidavit of Glenda Crawford testifies that she heard Bruce Raines tell the new the Front Desk Supervisor, Amanda Fox, after she took a personal check from a guest that she needed to be careful since she had just fired and employee (Rose Brown) for taking a check. (Crawford Affidavit). Gloria Crawford also verifies that it was the policy to take checks with proper identification and no one had changed that policy. The termination of an older protected African-American employee and not terminating younger Caucasian employees for the same alleged offense is *ipso facto* discriminatory and

demonstrates that the discharge of the Plaintiff Brown for taking a guest's check with proper identification was only a pretext. Defendant's front desk manager, Amanda Fox, also suggested a further pre-textual claim that a guest had complained about the Plaintiff Brown being rude sometime previously, but Plaintiff Brown was never told about the complaint until her discharge. Other Caucasian employees had not been discharged because of a guest complaints and discharging Plaintiff Brown because of one guest complaint was blatant pretext. (Brown Affidavit). Plaintiff Brown had never been informed or verbally warned that she had been rude to any guest or anyone else at the Wyndham Hotel during her over two year tenure, and Bruce Raines never received a complaint from anyone. (Brown Affidavit). Plaintiff Brown notes in her affidavit that she had Front Desk Supervisor Amanda Fox handle the irate guest. She was not allowed to see the purported complaint and she was never told about any change in policy not to accept a personal check with proper identification. (Brown Affidavit attached as Exhibit C; Brown deposition, p 67-70). The real reason that Plaintiff Brown was terminated is that she did not have the right look for the front desk because she was an older African-America. (Brown deposition, p 70-71, 94). Plaintiff Brown was discharged on a pretext in order to terminate her, but the pretext was a discriminatory excuse to continue the pattern and practice to get rid of the older African-American front desk employees to provide the front desk with employees with the "right look." She and other African-American front desk employees were replaced by young Caucasian front desk employees. Seven African-American and older managers as well as four front desk employees were immediately discharged or demoted and seven young Caucasian managers, three Caucasian executives, and four Caucasian front desk employees were immediately hired by the Defendant following the acquisition of the Hotel and no African-American managers, Executives or front desk employees hired following the acquisition. (Davis deposition, p 108-109,; Brown deposition, p. 152; Plaintiff's

Exhibit 1). Plaintiffs' Exhibit 1 is attached with its transmittal letter to the EEOC explaining the totality of the discriminatory discharges and demotions of all the three African-American managers and virtually all African American front desk employees. (Exhibit 1, Attached as Exhibit A to Plaintiff's Response to Motion for Summary Judgment).

The pretexts given for the firing of Plaintiff Brown are just not credible because there simply was no hotel policy about the taking of personal checks, and Amanda Fox had even accepted a person check from a guest and was not discharged. The other pretext for discharging her is also withers Brown had not a single guest complaint in over two years though many Caucausian front desk employees had received guest complaints (written and oral and even counseled and taken off the front desk) but none were let go or received any other form of reprimand. (Brown Affidavit). Discharging Plaintiff Brown for her first guest complaint when other Caucasian front desk employees received repeated complaints from guests but were not discharged is *ipso facto* discrimination and proves the pretext.

Petitioner Ameck who was the restaurant manager had worked for the hotel for almost twenty years and was obviously qualified having been the Restaurant Manager for over ten years. She was sixty years old when she was constructively discharged on pretexts because she did not have the right look and age to fit the youthful image of the Houlihan's restaurant with whom Respondent had recently entered into a franchise agreement. (Amick deposition, p. 71-72, 152-153). The decision to franchise the restaurant as a Houlihan's restaurant, and shortly thereafter the initiation of the memos critical of her performance were pretexts. The main thrust of the memos and other criticisms of her performance was that the restaurant was not being adequately staffed and required overtime to cover the supervision and employees necessary for all shifts. However,

the recruitment of applicants was the responsibility of Human Resources and France Brady retained the final hiring decision based on hiring employees with the right "look" and primarily youthful employees were hired. (Amick deposition, p 71-72). The ostensible reasons for constructively discharging Plaintiff Amick are pretextual because the restaurant did not have adequate staff and that overtime was required to cover all shifts when the Plaintiff Amick had no control over the recruitment that was the responsibility of Human Resources or even the final hiring decisions which was retained by Franco Brady and limited by hiring only the applicants who had the right "look."

Respondent hired two replacement managers in their mid twenties. Petitioner Amick was not even sent to training for Houlihan's. During the eight-week Houlihan's management training, Franco Brady filled up a file of complaints to discharge Plaintiff Amick upon the return of two replacement managers in their mid-twenties who were actually sent for training. (Amick deposition, p. 153-154, 202-204). By the time Petitioner Amick was terminated there was not a single over forty year old manager left standing by the Respondent. (Amick deposition, p 201-202).

THE EEOC WAS PUT ON NOTICE OF THE WIDE SPREAD DISCRIMINATORY PATTERN AND PRACTICE OF THE RESPONDENT DISCHARGING AFRICAN-AMERICAN AND OLDER EMPLOYEES AND PRODOMINATELY REPLACING THEM WITH CAUCASIAN AND YOUNGER EMPLOYEES

The District Court denied class action certification for the Class who were discriminated against on account of race because a proffered amendment by the plaintiffs' attorney putting the EEOC on notice of the Petitioner's class action claims was not verified. The District Court cites no EEOC requirement that an amendment be verified only that the initial EEOC charge be verified and the initial charges of

the Plaintiff were verified. The very EEOC regulation cited in the district court's Order of June 10, 2004 permitting a charge to be amended to "cure technical defects or omissions, including he failure to verify the charge, or to clarify and amply allegation made therein" does not require verification of the amendment. 29 C.F.R. § 1601.12 (b).

The District Court found that the Petitioner's Attorney's letter "does not 'clarify or amply' any of the original charges' allegations." The simple answer to the contention that the Petitioners did not notify the EEOC of the alleged racial and age discriminatory patterns and practices of the Respondent is that the Petitioners did put the EEOC on notice and provided proof of the wide spread racial and age discriminatory practices in attached to the position statement. This position statement from the Petitioners' counsel provided preliminary pattern proof of the racial and age discriminatory terminations and further amended the EEOC charges:

> "The Charging Parties desire to amend their EEOC charges to add age and gender discrimination to the filed racial discrimination charges for themselves and all other similarly situated employees who have been discriminated against by Valley Hospitality."

Copies of this position paper and amendment to the EEOC charge were furnished to the Respondent's former counsel. Thus, any contention that the EEOC was not put on notice of the systemic class wide discrimination is simply wrong. The attached statistical analysis at that time in January, 2003 demonstrated the discriminatory pattern and practice of the then obvious demographic disparity before and after the acquisition that six older African-American were terminated or demoted while thirteen younger Caucasian managers and front desk employees had been

hired. This position letter and amendment of the charge certainly satisfies *Grayson v. K-Mart Corp.*, 79 F. 3d 1086, 1107 (11th Cir. 1996) to "alert the EEOC that 'more is alleged than an isolated acted act of discrimination'" and "to afford the EEOC an opportunity to resolve the dispute short of litigation" and that "to make an allegation of class wide discrimination, 'there must be indication that the grievance affects a group of individuals defined broadly enough to include those who seek to piggyback on the claim.'"

The purposes of the EEOC charge, 29 U.S.C. § 626 (d) are "(1) to give the employer prompt notice of a complaint against it, and (2) to give the EEOC sufficient time to attempt the conciliation process before civil action is filed." *Grayson v. K Mart Corp*, supra at 1103. *Mooney v. Aramco Service Co.*, 50 F. 3d 1207, 1223 (5th Cir. 1995) instructs that "it would be wasteful, if not vain for numerous employees, all with the same grievance, to have to process many identical complaints with the EEOC." Therefore, in a class action context, victims of discriminations are permitted to "piggyback" their claims upon those who have filed EEOC charges.

In *Grayson*, the Eleventh Circuit addressed the sufficiency of EEOC "notice of 'class-wide' discrimination" for piggybacking – finding that the notice must only "give some indication that the grievance affects a group of individuals defined broadly." 79 F. 3d at 1107. In *Grayson* simply referencing the fact that "others similarly situated were fired provided sufficient notice." Id. at 1108. Later this Circuit again addressed the rules for piggybacking and made clear that they are "fairly lenient' and "not particularly stringent." *Hipp v. Liberty National Life Insurance Co.*, 252 F. 3d 1208,1214-1219 (11th cir. 2001). Indeed, *Hipp* makes clear that the only notice need be that "other employees were affected." Id. at 1225 N. 20.

In making this assessment, the Court should look at the EEOC filings collectively. See *Stone v. First Union*, 203 F.R.D. 532, 538 (S.D. Fla. 2001) (sufficient notice of class wide discrimination in the EEOC filings). Moreover, claims that the allegation of class wide treatment was too "vague" genereally fail under the liberal notice requirement. See, e.g. *Howlett v. Holliday Inns, Inc.* 49 F. 3d 189, 194-197 (6th Cir. 1995) ("Wile the charge falls short of an allegation of class-wide discrimination, it ' certainly provided notice that individuals other than Ivey were affected by Holliday Inns' actions, and that those who were affected were older, more senior employees").

Considering the collective charges and the specific class action amendments in this case and the class wide allegations in the Plaintiffs' statement of position by their counsel even amending the charges to provide for class action "for themselves and similarly situated employees who have been discriminated against by Valley Hospitality", there is plainly specific and sufficient notice that the African-American and older employees were impacted on a very broad scale indeed.

CLASS ACTION SHOULD HAVE BEEN CERTIFIED BECAUSE THE RESPONDENT HAS UNLAWFULLY ENGAGED IN A WIDE SPREAD DISCRIMINATORY PATTERN OF DISCHARGING AFRICAN-AMERICAN AND OLDER EMPLOYEES WHILE REPLACING THEM WITH CAUCASIAN AND YOUNGER EMPLOYEES AFTER ACQUIRING THE WYNDHAM HOTEL

The Respondent Valley Hospitality after acquiring the ownership and assuming management of the Wyndham hotel in Columbus Georgia has engaged in a pattern and practice of race and age discrimination against African-American and older managers, front desk employees, and

other employees. These employees seek to come together as a Class to prove that the pattern and practice of discrimination in discharging predominately African-American and older managers, front desk employees, and other employees at the Wyndham Hotel and replacing them with predominately Caucasian and younger replacements. The Petitioners for themselves and on behalf of similarly situated employees in the Class seek to enjoin the policies and practices of the Defendant Valley Hospitality which have cause them to be unfairly treated and to obtain redress for damages that they have suffered and will continue to suffer unless addressed in this collective class action. The law not only permits certification of a Class in this case, but demands it.

The Respondent Valley Hospitality vigorously opposed the efforts of African-American and older employees to exercise their civil rights collectively. The Respondent prefers to litigate each case separately so that the Respondent can use its superior resources to pick off African-American and older employees one at a time whom they had discriminatorily terminated from employment at the Wyndham Hotel. Indeed, the Respondent Valley Hospitality's true strategy is that the gross imbalance of economic and legal resources will deter many African-American and older employees from bringing claims of discrimination at all. The sad truth is not simply that the Respondent Valley Hospitality and related subsidiaries have engaged in a pattern and practice of discrimination against African-American and older employees and sought to obstruct legitimate attempts to even discovery who these employees who are that have been discriminated against.

However, the discriminatory practices by the Respondent are clear. The analysis presented during the investigation by the Equal Employment Opportunity Commission demonstrates that that immediately after acquiring ownership and management of the Wyndham

Hotel that the Respondent terminated or demoted all three of the only African-American managers and then hired nine Caucasian younger managers and similarly terminated three African-American front desk employees and then hired four Caucasian younger front desk employees. The Defendant's Supplemental Objections to Plaintiffs' Motion to file Amended Complaint- Class Action provides statically significant evidence of admissible evidence admitting that a total of forty African-American and fifteen over forty year old employees have been terminated and replaced with predominately Caucasian and under forty year old employees. The Defendant's Supplemental Objection Brief in footnote 5 amazingly admits the very substantial disparate impact that of a total of forty African-American employees have been terminated of which only seventeen were replaced by African-American employees and that of a total of fifteen employees over the age of forty of which only five were replaced by individuals over forty years of age. Three of these alleged replacement employees were the three top managers of the Respondent who were over forty years old: Briam Plemons, General Manager; Bruce Raines, Rooms Director; and Franco Brady, Food and Beverage Director. So of the 15 employees terminated after the Defendant's acquisition of the Wyndham Hotel a maximum of 2 replacement employees over the age of forty were hired.

Thus, the Respondent's own filing *ipso facto* proves the enormity of the disparate impact of the Respondent's discriminatory pattern and practice of terminating African-American and over forty years of age employees and replacing them with predominately Caucasian and younger employees. More fundamentally this admission of the extreme statistical disparity also provides proof of intentional disparate discriminatory employment terminations and hiring by the Respondent at the Wyndham Hotel which will probably be similarly reflected in discriminatory terminations and hiring system wide at the Respondent's other hospitality properties because of a concerted policy to

weed out the employees who in general manager Brian Plemons words do not have the subjective "the right look." It doesn't take a statically savvy expert to determine that the terminations of an extremely substantial numbers of employees within the protected racial and age classes and replacing them with a disparate two out of three Caucasians and a ratio of seven and a half to one of terminations of older employees replacing them with younger employees violates the civil rights laws. This almost three hundred percent racial discrimination percentage and a staggering seven hundred and fifty percent age discrimination percentage are simply indefensible and evidence enough of the racial and age discriminatory pattern and practice.

The intentional discrimination is also demonstrated by the bad faith of the Respondent by violating the policy of the Respondent's announced by general manager Brian Plemons in managers and employees meetings on October 25, 2002 and November 1, 2002 and at a news conference on November 4, 2002 announced by the Defendant's owner, Jack Pezold, publicly stating that no employees would lose their jobs and that all employees would continue in their positions at the Wyndham Hotel. This statement of assurance of continued employment for all managers and employees at the Wyndham Hotel was clearly in bad faith because the Defendant on the very same day of the news conference, November 4, 2003, terminated or demoted all three of the only African-American managers. Two of the African-American managers, Petitioners Davis and Duncan, were terminated just before the news conference and the third was demoted from "by request" manager to housekeeping manager. This was just the beginning of the pattern and practice of terminating African-American and older managers, front desk employees, and other employees at the Wyndham Hotel and wholesale replacing them with predominately Caucasian and younger employees which has continued the same racial and age discriminatory pattern and

practice in gross disregard of the civil rights laws of our country.

The four prerequisites of Rule 23 (a), the proposed class are met as well as the requirements of Rules 23(b)(2) and 23(b)(3). The Plaintiffs and similarly situated former employees in The Class share the common question of law and fact that the Respondent has engaged in a pattern and practice of discrimination on account of race and age against the Petitioners and similarly situated managers, front desk employees and other employees at the Wyndham Hotel in violation of the civil rights laws thereby making appropriate injunctive relief and corresponding declaratory relief as well as monetary relief with respect to the Class as a whole.

The District Court should have certified a Class in this case because Petitioners' claims raise common legal and factual issues that are fundamental to every class member and that can and should be tried on the basis of common proof. The common question are (1) whether the Respondent has engaged in a pattern and practice of discrimination, (2) whether the Respondent maintains policies and practices that have a disparate impact on African-American and older employees, (3) whether the reckless indifference of Respondent warrants punitive damages should be resolved on a class-wide basis, not litigated over and over again in individual actions. Resolution of the fundamental question of whether the Defendant has engaged in a pattern and practice of race and age discrimination will determine whether the Class is entitled to injunctive relief and will, if Petitioners succeed, create a presumption of discrimination for every single member of the Class in individual proceedings for monetary relief. Petitioners intend to try this overarching common question primarily with statistical evidence of common practice and pattern as a method of proof. Accordingly, this warrants class certification because it allows Petitioners to prove a pattern and practice, limiting the necessity of putting on evidence of individual

discriminatory treatment. *Kilgo v. Bowman Transport, Inc.* 789 F. 2d 859, 874 (11th Cir. 1986).

Statistical employment discrimination cases are paradigm class actions, and courts have repeatedly certified such cases under Rule 23. See *Hazelwood School District v. United States,* 433 U.S. 299, 307-308 "where gross statistical disparities can be shone alone may in a proper case constitute prima facie proof of a pattern or practice of discrimination." The common factual questions of whether statically significant disparities exist in the Respondents treatment of African-American and older employees should be resolved once and not litigated many, many times. Petitioners offered proof of the effect of common patterns and practices resulting in substantial race and age disparities including the admitted statistical information that the Respondent has discharged forty African-American employees while only rehiring seventeen African-American employees and discharging fifteen employees over the age of forty and only hiring two over the age of forty excluding the Respondent's top management team. Further, class treatment is the only means for Plaintiffs to pursue system wide injunctive relief necessary to reform the Respondent's deficient employment policies and practices.

Class treatment of this controversy is clearly superior to resolution through filing a host of individual actions. Certification permits the common adjudication of questions that would otherwise be litigated repeatedly and thus avoids both duplicative proceedings and inconsistent results. *Cox,* 784 F. 2d at 1554. Indeed, the individual former employees who have been discriminated against on account of race and age would not be able to bear the costs of individual litigation or even secure legal representation. The aggrieved parties would be without effective relief unless class action were available. See *Deposit Guarantee National Bank v. Roper,* 445 U.S. 326, 338-9 (1980). Further, absent class treatment, it is virtually impossible for former employees to

obtain systemic injunctive relief. In practical terms class action certification is the only way to obtain judicial scrutiny to remedy and prevent in the future the obvious and admitted systemic disparate impact and intentional racial and age disparate treatment of the present and former managers, front desk employees, and other employees at the Wyndham Hotel and at other hospitality properties owned and managed by the Respondent company whose stated purpose is to have "the right look" of managers, front desk employees, as well as other employees at its properties.

It is submitted that the actions of the Respondent in terminating African-American and older managers, front desk managers, and other employees pursuant to discriminatory patterns and practices including terminating predominately African-American and older employees who might did not have the subjective "right look" and hiring predominately Caucasian and younger employees who did have the "right look" is demonstratively appropriate for class treatment.

PETITIONERS PRESENTED BOTH STATISTICAL EVIDENCE AND DIRECT EVIDENCE WHICH PRESENTS GENUINE ISSUES OF MATERIAL FACT THAT THEY WERE DISCHARGED BECAUSE OF THEIR RACE AND AGE

In *Aman v. Cort Furniture Rental Corp.*, 85 F.3d 1074 (3rd Cir. 1996), the Third Circuit Court of Appeals instructs that:

> Discrimination continues to pollute the social and economic mainstream of American life, and is often simply masked in more subtle forms. It has become easier to coat various forms of discrimination with the appearance of propriety, or to ascribe some other less odious intention to what is in reality

> discriminatory behavior . . . But regardless of the form that discrimination takes, the impermissible impact remains the same, and the law's prohibition remains unchanged. .... [Therefore] [c]ourts today must be ***increasingly vigilant*** in their efforts to ensure that prohibited discrimination is not approved under the auspices of legitimate conduct . . . . *Id.* at 1082 (emphasis added).

In this case, the statistical and documentary evidence, including Respondent's statements that the employees of the newly acquired Wyndham Hotel had to have the right look exhibits a clear pattern of discrimination that is not otherwise explainable. The intentional and disparative effect is clearly evident that all the African-American and older managers were discharged and replaced by Caucasian Managers or demoted to the back of the house and the same intentional and disparative effect occurred with the front desk employees where four African-Americans including the older protected Petitioner Brown were discharged and four young Caucasian front desk employees were hired in their place. The admitted disparative hiring of replacements employees is just overwhelmingly discriminatory of racial and age bais toward young and Caucasian employees after the acquisition of the Wyndham Hotel by the Defendant. Such evidence counters any suggestion that Defendant may be entitled to judgment as a matter of law on any issue now before the Court.

Evidence that the older and African-American Petitioners were individually replaced by young and Caucasian managers and front desk employees is sufficient enough to preclude summary judgment. The recent case of *Miller v. Aramark Corp.* 2004 U.S.Dist. LEXIS 16023, 94 Fair Empl. Prac. Cas. (BNA) 500 (N.D. Ala. 2004) instructs that when an employee within a protected class is allegedly discriminatory terminated and that their duties were replaced

by an employee not within the protected class there exists a guanine material issue of fact and summary judgment should therefore be denied.

Summary judgment is appropriate only when no genuine issue of material fact exists, and the moving party is entitled to judgment as a matter of law. Fed.R.Civ.P. 56(c); *Celotex Corp. v. Catrett*, 477 U.S. 317, 322-23 (1986). As movant, defendant must first carry the "exacting burden" of showing the absence of a genuine issue as to any material fact before plaintiffs, as non-movants, need even present rebuttal evidence. *Clark v. Coats & Clark*, 929 F.2d 604, 606-607 (11th Cir. 1991)(citing *Adickes v. Kress*, 398 U.S. 144, 157 (1970)); *see also Impossible Elecs. Techniques, Inc.v. Wackenhut Protective Systems, Inc.*, 669 F.2d 1026, 1031 (5th Cir. 1982). Because issues of material fact clearly exist and because defendant is not entitled to judgment as a matter of law, this case should be reversed and remanded.

Under the *McDonnell Douglas/Burdine* three-part framework, the burden lies first with the plaintiff's to prove, by a preponderance of the evidence a prima facie case of discrimination. Second, if the plaintiff succeeds, the burden shifts to defendant to come forward with some legitimate, nondiscriminatory reason for the employment decision. Finally, should the defendant carry its burden, the plaintiff has the burden of proving that defendants reasons were a mere pretext for discrimination. *Texas Dept. of Comm. Affairs v. Burdine*, 450 U.S. 248, 252-53 (1981).

The recent case of *Alford v. COSMYL, Inc.*, 209 F. Supp. 2d 1361, 1368 (M.D. Ga. 2002) succinctly sums up the law, "Once a plaintiff has established a *prima facie* case and has put on sufficient evidence to allow a fact finder to disbelieve an employer proffered explanation for its actions, that alone is enough to preclude entry of judgment as a matter of law." *Williams v. Vitro Services Corp.* 144 F. 3d 1438, 1441 (11th Cir. 1998). (citing *Combs v. Plantation*

Patterns, 106 F. 3d 1519, 1532 (11th Cir. 1997); see also *Reeves v. Sanderson Plumbing Products, Inc.* 530 U.S. 133 (2000).

Petitioners have presented facts sufficient to satisfiy the most basic McDonald Douglas prima facia case with statistical evidence combined with other cercumstancial evidence demonstrate disparate treatment, The Supreme Court has explained that the standard for proof of a prima facie case is not inflexible, given that facts necessarily vary in disparate treatment cases, and that the traditional four part test is not necessarily applicable in every respect in differing factual situations. *McDonnell Douglas*, 411 U.S. at 802 n. 13. All that is required is that the plaintiff come forward with evidence sufficient to "create an inference" of discrimination. *Id.* Under the traditional test, a plaintiff establishes a prima facie case by showing that: (1) she belongs to a racial minority; (2) she applied and was qualified for a job; (3) despite her qualifications, she was rejected; and (4) after her rejection, the position remained open. *McDonnell Douglas*, 411 U.S. at 802. Similarly, when confronted with racially motivated adverse working conditions, a plaintiff may establish a prima facie case by showing that: (1) she belongs to a racial minority; (2) she was subjected to adverse action; (3) that similarly situated employees received more favorable treatment; and (4) she was qualified to do the job. *Holifield v. Reno*, 115 F.3d 1555, 1562 (11th Cir. 1997).

It is well settled that proof of the *McDonnell Douglas* criteria is not the only way to establish a prima facie case of disparate treatment. Indeed, "*McDonnell Douglas* provides only *one* method of establishing discrimination." *Carmichael v. Birmingham Saw Works*, 738 F.2d 1126, 1131 (11th Cir. 1984)(emphasis supplied by the court)(citing *Texas Dept. of Comm. Affairs v. Burdine*, 450 U.S. 248, 253 n. 6 (1981); *Internat'l Brotherhood of Teamsters v. United States*, 431 U.S. 324, 358 (1977)); *McDonnell Douglas*

Corp. v. Green, 411 U.S. 792, 802 n. 13 (1973). In fact, "[i]f they are strong enough, statistics alone may be enough to create a prima facie case of classwide discrimination . . . And ***there is no doubt that statistics can be relevant and important in an individual case***." *Carmichael*, 738 F.2d at 1131 (emphasis added). In *Holifield v. Reno*, 115 F.3d 1555, 1561 (11th Cir. 1997), the court went so far as to suggest that a plaintiff may establish a prima facie case of disparate treatment solely "on the basis of statistical proof of a pattern of discrimination." The percentage of replacements of protected employees by non protected employees off the charts and is overwhelming evidence of discriminatory discharging African-American and older managers, front desk employees and admittedly hiring youthful and Caucasian replacements.

Despite the strength of statistical proof, Petitioners also support this data with other circumstantial evidence of intentional discrimination, including the often stated motive of manages of the Respondent that the managers, front desk employees, and other employees had to have the "right look" being primarily young, Caucasian, and not overweight. The policy of having managers, front desk employees, and other employees with the "right look" clearly have a very substantial disparate impact on initially discharging or demoting all the African American manager who were older, then hiring exclusively only Caucasian Managers and front desk employees, and subsequently discharging a total of forty African-American employees while hiring only seventeen African American employees and no managers as well as discharging fifteen managers and employees while hiring only two employees who were over forty years of age exclusive of the Respondent's executive committee that was brought in after the acquisition of the Wyndham Hotel. Just such evidence has, in this Circuit, been found sufficient to meet the requirements of a prima facie case. Specifically, in *Harris v. Birmingham Board of Education*, 712 F.2d 1377 (11th Cir. 1983), the court held that statistical evidence, a

showing of subjective hiring standards, and a history that included past racial discrimination was "enough to compel a finding of employment discrimination." *Id.* at 1383.

Statistical evidence in conjunction with employer comments that present circumstantial evidence of discrimination precludes summary judgment in corporate restructuring discrimination cases. *Scott v. Goodyear Tire & Rubber Co.*, 160 F.3d 1121, 1129 (6th Cir. 1998) (summary judgment denied where, during corporate restructuring, disproportionate percentage of older employees were not redeployed and two company executives made statements that company "is run by white haired old men, waiting to retire"); *see also Cicero v. Borg-Warner Automotive, Inc.*, 280 F.3d 579, 593 (6th Cir. 2002) ("Cicero's statistics offer some proof that the defendants had a pattern of hiring and firing that adversely affected [protected] employees. This evidence coupled with other circumstantial evidence that Cicero offers raises a triable issue of fact that the defendant's proffered reason for dismissing Cicero was a pretext for discrimination").

The Eleventh Circuit too has repeatedly held that "subjective selection processes involving white supervisors provide a ready mechanism for racial discrimination." *Harris*, 712 F.2d at 1383 (citing *Parson v. Kaiser Aluminum & Chem. Corp.*,575 F.2d 1374, 1385 (5th Cir. 1978). Additionally, this Circuit has held that "'[t]he failure to establish fixed or reasonably objective standards or procedures for hiring is a discriminatory practice.'" *Id.* (quoting *Watson v. National Linen Service*, 686 F.2d 877, 881 (11th Cir. 1982); *see also Howard v. BP Oil Company*, 32 F.3d 520, 526 (11th Cir. 1994)("subjective and *ad hoc* criteria [viewed] with greater scrutiny"). The subjective criteria of the Respondent's desire to retain and hire only managers and front desk employees as well as other employees certainly have a discriminatory disparate effect in discharging or demoting to the back of the house virtually all

the older African-American managers and initially discharging four of the front desk employees.

In determining whether Plaintiff has set forth a prima facie case of discrimination, the court must consider "all of the evidence, statistical and non-statistical" and should assess it "on a cumulative basis." *Pitre v. Western Electric*, 843 F.2d 1262, 1268 (10th Cir. 1988)(quoting *EEOC v. American Nat'l Bank*, 652 F.2d 1176, 1189 (4th Cir. 1981). All that is required is an inference of discrimination. In this case, however, plaintiffs' evidence goes well beyond a mere inference and, taken as a whole, should compel a finding of discrimination in the first instance.

The statistical evidence, which Respondent presents in its own briefs to this Court, is powerful evidence of pre-textual discrimination. While corporate restructuring is a legitimate business decision, it cannot be done as a way to clean house of older and/or minority employees or to even have a disparate impact on these protected categories. But here, the defendant admits facts which certainly demonstrate that this was in fact the goal. And statements of executives of the defendant illuminate their motive to terminate all managers, front desk employees and other employee who did not have the "right look" which obviously did not include older and African-American managers, front desk employees and other employees at the Wyndham Hotel after its ownership and management was acquired by the Respondent. "A nexus exists between the allegedly discriminatory statement and the company's termination decision[s]." *Id.; Tomsic v. State Farm Mut. Auto. Ins. Co.*,85 F.3d 1472, 1477 (10th Cir. 1996).

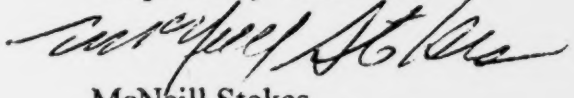
CONCLUSION

In *Ash v. Tyson Foods, Inc.*, this Court held that the Eleventh Circuit's standard for pretext was "unhelpful and imprecise." Moreover, this Court held, in vacating and

remanding the decision of the Eleventh Circuit, that a combination of racially charged statements and arguably superior qualifications could present a jury question in a discrimination case. Despite this Court's teachings, the Eleventh Circuit has again rejected even more powerful evidence of discrimination including (1) a statistical showing of a pattern of discrimination, (2) racially charged statements and (3) termination of arguably more qualified persons in protected classes. This Court should again, and with even more clarity, correct the Eleventh Circuit's test that still fails to follow the teachings of *Ash v. Tyson Foods, Inc.*

Class action certification is proper and should have been granted to certify a class of African-American and over forty years of age managers, front desk employees who have been discriminatorily terminated because of race and age following acquisition of the Wyndham Hotel by the Defendant. Summary judgment was improper because Petitioners demonstrated with statistical evidence and direct evidence as well as the Respoondent's admitted pattern and practice of discriminatorily discharging predominately African-American and over forty years of age managers, front desk employees including the Plaintiffs following the acquisition of the Wyndham Hotel. The expressed policy of the Respondent of terminating and employing only manages, front desk employees, and others employees who had the "right look" had a disparate impact and caused systemic discrimination against African-American and older employees including Petitioners.

Respectfully Submitted,



McNeill Stokes
Attorney for Petitioners

No. _____

In The Supreme Court of the United States

SANDRA J. DAVIS; VELINA B. DUNCAN; ROSE BROWN; AND ANNETTE AMICK,

Petitioners,

v.

VALLEY HOSPITALITY SERVICES, LLC,

Respondent.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Eleventh Circuit

APPENDIX

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U.S. COURT OF APPEALS
ELEVENTH CIRCUIT
November 30, 2006
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IN THE UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

No. 05-13670
Non-Argument Calendar

D.C. Docket No. 04-00020-CV-CDL-4

SANDRA J. DAVIS,

Plaintiff-Appellee,

VELMA B. DUNCAN, et al,

Plaintiffs,

versus

VALLEY HOSPITALITY SERVICES, LLC,

Defendant-Appellant.

Appeal from the United States District Court
For the Middle District of Georgia

(November 30, 2006)

Before BIRCH, PRYOR, and FAY, Circuit Judges.

PER CURIAM:

Defendant Valley Hospitality Services, LLC. ("Valley Hospitality") appeals the interlocutory order denying its motion for summary judgment against plaintiff Sandra J. Davis in her employment discrimination action.[1]

Davis, an over 40-year-old African-American woman, was employed as Front Office Manager at the Wyndham hotel in Columbus, Georgia. During her employment, the hotel had eight department managers, including the Front Office Manager, who reported to the General Manager. As Front Office Manager, Davis managed seven to ten employees, and supervised five areas including the bell staff, communications, front desk, reservations, and security. In October 2002, Valley Hospitality was chosen to take over management of the hotel and began planning toward that end. The Wyndham's acting general manager held a meeting with the hotel managers in late October 2002, advised them of the anticipated changes in management organization, and asked each employee to complete a new application for employment and submit to a drug test. On 31 October 2002, Davis completed an application for employment for the position of "Guest Service Manager." Exh. 66 at Exh. 4.

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[1] This appeal was consolidated with Nos. 05-13107 and 05-13342, appeals filed by plaintiffs Velma B. Duncan, Rosa Brown, and Annette Amick from orders which, respectively, denied their motion for class certification and granted Valley Hospitality summary judgment on their employment discrimination claims. In the separate opinion issued in those appeals, we vacated the consolidation of those appeals with this case.

On 1 November 2002, Valley Hospitality took over full control of the Wyndham. It reorganized the hotel management into three functional areas: sales, finance, and general hotel operations. The general hotel operations were organized into two departments which were supervised by executives: the Rooms Department and the Food and Beverage Department. The Rooms Department Executive was given supervision of a newly created of Front Desk Supervisor; the staff previously assigned to the Front Office Manager, including the bell staff, communications, reservations, and security; and other staff, including housekeeping, laundry, and maintenance. The Front Desk Supervisor oversaw only the front desk and its staff, lost supervision of numerous positions previously assigned to the former Front Office Manager, and earned less than the former Front Office Manager. The newly created positions, including "front desk clerks," were advertised in the local newspaper on 3 November 2002. Exh. 66 at 103-04, Exh. 7.

On 4 November 2002, Davis was terminated because her position was eliminated. Immediately after being advised of her termination, she asked whether there were any other positions that she could do at the hotel. She was told "no." Exh. 66 at 71-72.

The Front Desk Supervisor position was filled on 4 November 2002 with an African-American male. He was dismissed on 6 November when his drug test came back positive, and was replaced by a 24-year-old white female who transferred from another Valley Hospitality property.

On 19 November 2002, Davis filed a charge of discrimination with the Equal Employment Opportunity Commission ("EEOC"). In her charge, she stated that she was "discharged from [her] position as Front Desk Manager/Supervisor" despite assurances that she would remain in her position following a change of ownership.

R1-31, Exh. A. She alleged that she was "discriminated against ... based on [her] race (Black)." Id.

Davis subsequently brought an action against Valley Hospitality under 42 U.S.C. § 1981 and 29 U.S.C. §§ 623, alleging that she was discharged on the basis of her race and age, respectively. She requested job reinstatement and monetary damages. She argued that her position was not truly eliminated but was merely renamed and that the position was filled with a younger white woman. Valley Hospitality moved for summary judgment, and explained that all of the hotel's employees were required to complete a new employment application during the reorganization. Although Davis stated that she wanted another position at the hotel, she also answered "[n]o" when asked if she wanted to be transferred to a different position within the hotel. Exh. 66 at 107-08. Valley Hospitality responded that Davis failed to apply for any advertised position with the hotel after her position was terminated.

The district court denied Valley Hospitality's motion for summary judgment as to Davis's individual disparate treatment claim. It found that Davis had established a rims facie case of both race and age discrimination and that, although Valley Hospitality had articulated a legitimate nondiscriminatory reason for eliminating her position, it had not provided a legitimate nondiscriminatory reason for not rehiring her. The court reasoned that Davis's 31 October application for Guest Services Manager constituted an application for the Front Desk Supervisor position because she had no way of applying for the newly created Front Desk Supervisor position when she completed her application. The district court denied Valley Hospitality's motion for reconsideration, and certified the denial of summary judgment as to Davis's claims for interlocutory appeal pursuant to 28 U.S.C. § 1292(b).

On appeal, Valley Hospitality argues that the district court improperly found that it had discriminated against Davis by failing to hire her for the Front Desk Supervisor position because she never asserted a failure to hire claim in the case. It maintains that her case is based on solely on her termination. It notes that she conceded this point in her response to Valley Hospitality's motion for reconsideration when she stated:

> The employment action that discriminatorily affected [Davis] was the discharge of her from employment with [Valley Hospitality]
> . . .
> . . .
> This is not a failure to hire case, but as [Davis] correctly alleged in the Amend[ed] Complaint that [she] was discharged [based on her race and age].

R4-89 at 2.

In employment discrimination actions, the plaintiff's judicial complaint is limited to "the scope of the EEOC investigation which can reasonably be expected to grow out of the charge of discrimination." Mulhall v. Advance Sec., Inc., 19 F.3d 586, 589 n.8 (11th Cir. 1994). The complaint must provide "'a short and plain statement of the claim' that will give the defendant fair notice of ... the . . . claim ... and the grounds upon which it rests." Conley v. Gibson, 355 U.S. 41, 47, 78 S. Ct. 99, 103 (1957) (citing Fed. R. Civ. P. 8(a)). Allegations which fail to provide such notice are appropriately subject to summary judgment. Swierkiewicz v. Sorema N.A., 534 U.S. 506, 514, 122 S. Ct. 992, 998 (2002).

To assert a failure to hire claim, the plaintiff must show, inter alia, that she applied for a job for which she was qualified and which was available at the time of her

termination. Smith v. J. Smith Lanier & Co., 352 F.3d 1342, 1344-45 (11th Cir. 2003) (per curiam). A plaintiff who has knowledge of an advertised position, but fails to formally apply for it, is unable to show that she applied for the position. Id. at 1345-46. "A general interest in being rehired without submitting an application is not enough to establish a prima facie case of age discrimination when the defendant-employer has publicized an open position."[2] Id. at 1345.

A claim of wrongful discharge is not the equivalent of a claim of failure to hire. Davis's EEOC wrongful discharge claim and the resulting investigation would not trigger an inquiry into Valley Hospitality's hiring policies. She did not apply for an advertised position after Valley Hospitality had reorganized the management positions and she was terminated. Further, Davis expressly stated that she was not raising a failure to hire claim. Accordingly, the district court erred by finding that a rehiring claim was raised and by denying Valley Hospitality's motion for summary judgment regarding her discharge.

The district court's denial of Valley Hospitality's motion for summary judgment on Davis's claims is,

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[2] Although we have noted that the lack of an application for a specific job would not defeat a failure to hire claim where the plaintiff applied for "work" but was initially told that no full-time positions were available, we explained that the plaintiff learned of the possibility of a position "by word of mouth" and that "[t]he defendant did not advertise its job openings." Carmichael v. Birmingham Saw Works, 738 F.2d 1126, 1129, 1132 (11th Cir. 1984). We commented that the plaintiff "was not required to do more than indicate as best he could that he would take any available job" and "could not be expected to ask for a [specific] position when he did not know one was available." Id. at 1132.

therefore, **REVERSED** and the matter is **REMANDED** for further proceedings consistent with this opinion.

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Eleventh Circuit
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Atlanta, Georgia

[DO NOT PUBLISH]

FILED
U.S. COURT OF APPEALS
ELEVENTH CIRCUIT
November 13, 2006
THOMAS K. KAHN
CLERK

IN THE UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

No. 05-13107 and 05-13342

D.C. Docket No. 04-00020-CV-CDL-4

SANDRA J. DAVIS,

Plaintiff,

VELMA B. DUNCAN,
ROSA BROWN,
ANNETTE AMICK,

Plaintiffs-Appellants,

versus

VALLEY HOSPITALITY SERVICES, LLC,

Defendant-Appellee.

Appeal from the United States District Court
For the Middle District of Georgia

(November 13, 2006)

Before BIRCH, PRYOR and FAY, Circuit Judges.

PER CURIAM:

Plaintiffs Velma B. Duncan, Rosa Brown, and Anette Amick appeal the district court's orders in their employment discrimination action denying class certification, No. 05-13107, and granting defendant Valley Hospitality Services, LLC ("Valley Hospitality") summary judgment, No. 05-13342.[1]

Duncan, Brown, and Amick were employed and fired by a hotel in Columbus, Georgia, owned by Valley Hospitality. Following their terminations, each filed charges of discrimination with the Equal Employment Opportunity Commission ("EEOC"). Duncan alleged that she was fired because of her race, Brown alleged that she was fired because of her race and age, and Amick alleged that she was fired because of her age. R1-3 1, Exh. A. None of the EEOC charges sought to assert claims on behalf of other employees or alleged that Valley Hospitality's discrimination was class-wide. After Duncan and Brown had filed their charges but before Amick had filed her charge, Duncan and Brown's attorney sent a letter to the EEOC alleging that Valley Hospitality engaged in class-wide race and age discrimination and seeking "to amend their EEOC charges. . . for all other similarly situated employees." R2-33, Exh. A. The parties, however, took no further action to amend their EEOC charges. After the

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[1] These appeals were consolidated with No. 05-13670, in which defendant Valley Hospitality Services, LLC appealed the district court's interlocutory order denying its motion for summary judgment against plaintiff Sandra J. Davis. We hereby vacate the consolidation of these appeals. This opinion deals only with Nos. 05-13107 and 05-13342. A separate opinion will be issued as to No. 05-13670.

EEOC issued right to sue letters, Duncan, Brown, and Amick filed their complaint.

The district court correctly granted Valley Hospitality's motion to dismiss the class-wide discrimination charges because the letter from Duncan and Brown's attorney did not comply with Title VII's charge and amendment requirements. The letter did not constitute a valid EEOC charge of discrimination because it was not verified and there was no effort made to amend it to include a verification. See Vason v. City of Montgomery, Ala., 240 F.3d 905, 907 (11th Cir. 2001) (per curiam). The letter did not validly amend the previously filed charge because it clearly sought to add new separate charges of class-wide discrimination instead of clarifying or amplifying the original allegations. See 29 C.F.R. § 1601.12(b); Cheek v. W. & S. Life Ins. Co., 31 F.3d 497, 500, 502-03 (7th Cir. 1994). The charge, therefore, failed to give the EEOC or Valley Hospitality adequate notice that an investigation of class-wide discrimination was relevant to Duncan and Brown's individual claims. See Grayson v. K Mart Corp., 79 F.3d 1086, 1107 (11th Cir. 1996); Sanchez v. Standard Brands. Inc., 431 F.2d 455, 466 (5th Cir. 1979).

In a thorough and well-reasoned opinion, the district court also correctly granted Valley Hospitality's motion for summary judgment. The district court dismissed Duncan, Brown, and Amick's disparate impact claims because the policy leading to their asserted claim did not give rise to a disparate impact. Duncan, Brown, and Amick argued that they were adversely affected by the hotel's policy regarding the "right look." This policy was not facially neutral, but facially discriminatory, and its impact was properly reviewed under Duncan, Brown and Amick's systemic disparate treatment claim. See EEOC v. Joe's Stone Crab. Inc., 220 F.3d 1263, 1278 (11th Cir. 2000).

The district court correctly found that summary judgment was appropriate as to both the systemic and individual disparate impact claims of Duncan, Brown, and Amick.Duncan, Brown, and Amick claimed that Valley Hospitality's policy regarding a "right look" for employees treated African American and older employees less favorably and resulted in a greater discharge rate to them than that of white and younger employees. A plaintiff seeking to show an employer's pattern and practice of discrimination or disparate treatment based upon race and age must prove, typically through statistics and anecdotes, that the course of action was chosen at least in part because of its adverse effect on an identifiable group. Joe's Stone Crab, 220 F.3d at 1273-74, 1286-87. Duncan, Brown, and Amick failed to offer sufficient evidence to show that Valley Hospitality engaged in systemic disparate treatment as to positions in management or at the front desk. They offered no statistical evidence, and the uncontradicted evidence submitted by Valley Hospitality reflected that, although two African American managers were terminated, one African American manager was retained, and two over 40-year-old African Americans were promoted to management. They failed to offer sufficient evidence to show disparate treatment in the discharge of older and African American front desk employees.

Duncan, Brown, and Amick also failed on their individual disparate treatment cases. To establish a prima facie case of disparate treatment, the plaintiff must show (1) membership in a protected group, (2) subjection to an adverse employment action, (3) qualification for a position, and (4) placement in the position of an individual outside of a protected group. Chapman v. AI Transport, 229 F.3d 1012, 1024 (11th Cir. 2000) (en banc). Duncan was a member of a protected class, was subjected to an adverse employment action, and was qualified for the position for which she applied. She was unable to show, however, that Valley Hospitality offered the position that she applied for

to someone outside of the protected class or any other evidence of intentional discrimination on the basis of race. In fact, the evidence showed that the individual selected for the position instead of Duncan was an African American woman over the age of 40 who also qualified for the position.

Brown alleged that, while she was fired for certain infractions, white employees who committed the same infractions were retained. Although she established a prima facie case of discriminatory discharge, the evidence supported Valley Hospitality's proffered legitimate nondiscriminatory reasons for her dismissal and Brown failed to produce evidence showing that these reasons were pretextual. See R3-63 at 2; Clark v. Coats & Clark. Inc., 990 F.2d 1217, 1228 (11th Cir. 1993) (plaintiff s "burden of proving pretext ... can be met ... by discrediting the employer's proffered explanation.").

Because the evidence showed that Amick's position was eliminated and she did not show that she was replaced with an individual outside of the protected group, she was unable to establish a prima facie case of discriminatory discharge. To the extent that she did make a prima facie case, she did not show that Valley Hospitality's proffered legitimate nondiscriminatory reason for her discharge was pretextual. The evidence showed that Valley Hospitality was concerned with Amick's performance and counseled her numerous times before her discharge. R3-62, Exh. at 10-13; Exh. 65 at 131-32, 135-46, Exhs. 18, 21, 23, 25. Valley Hospitality's proffered reason for Amick's termination is "one that might motivate a reasonable employer" and we will not consider her arguments as to the wisdom of that reason. Chapman, 229 F.3d at 1030-31.

For the reasons stated above, the district court's dismissal of the class-wide discrimination charges and grant of summary judgment on Duncan, Brown, and

Amick's systemic and individual disparate treatment claims are

AFFIRMED.

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Clerk U.S. Court of Appeals
Eleventh Circuit
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Atlanta, Georgia

IN THE UNITED STATES DISTRICT COURT
FOR THE MIDDLE DISTRICT OF GEORGIA
COLUMBUS DIVISION

SANDRA J. DAVIS, VELINA B. DUNCAN, ROSE BROWN AND ANNETTE AMICK,	*	
Plaintiffs,	*	
vs.	*	
VALLEY HOSPITALITY SERVICES, LLC,	*	CASE NO. 4:04-CV-20-2 (CDL)
Defendant	*	

ORDER

The Court presently has before it several motions related to its April 25, 2005 Order granting in part and denying in part Defendant's Motions for Summary Judgment. In that Order, the Court granted Defendant's Motions for Summary Judgment with regard to the disparate impact and systemic disparate treatment claims of all four Plaintiffs and also granted summary judgment in favor of Defendant with regard to the individual disparate treatment claims of Plaintiffs Velina Duncan, Rose Brown and Annette Amick. The Court denied Defendant's Motion for Summary Judgment with regard to the individual disparate treatment claims of Plaintiff Sandra Davis, which are now the only claims remaining in the case.

Before the Court is Defendant's Motion for Reconsideration of its Order denying Defendant's Motion

for Summary Judgment with regard to the claims of Plaintiff Davis. In the alternative, Defendant has moved for certification for immediate appeal of the denial of Defendant's Motion for Summary Judgment pursuant to 28 U.S.C. § 1292(b). The Court also has before it, pursuant to Federal Rule of Civil Procedure 54(b), Plaintiffs' Motion for Entry of Final Judgment as to the claims of Plaintiffs Duncan, Brown and Amick.

Defendant's Motion for Reconsideration is denied.

Defendant's Motion for Certification, pursuant to 28 U.S.C. 1292(b), for immediate appeal of the denial of Defendant's Motion for Summary Judgment is granted. The Court's order of April 25, 2005, is hereby modified by the addition of the following paragraph:

The Court certifies, pursuant to 28 U.S.C. § 1292(b), that it is of the opinion that the denial of Defendant's Motion for Summary Judgment with regard to the claims of Plaintiff Sandra Davis involves a controlling question of law as to which there is substantial ground for difference of opinion and that an immediate appeal from the order may materially advance the termination of the litigation.

Plaintiffs' Motion for Entry of Final Judgment pursuant to Federal Rule of Civil Procedure 54(b) as to the claims of Plaintiffs Duncan, Brown and Amick is granted. In its April 25, 2005 Order, the Court completely disposed of these Plaintiffs' claims of disparate impact, systemic disparate treatment and individual disparate treatment by granting Defendant's Motion for Summary Judgment as to these claims. These claims are separable from Plaintiff Davis' claims for individual disparate treatment, which are the only claims not disposed of by the April 25, 2005 Order. The Court finds that there is no just reason for delaying entry of final judgment as to the claims of

Plaintiffs Duncan, Brown and Amick. Each Plaintiff is seeking separate relief based on separate sets of facts, and no useful purpose can be served by postponing the final disposition of the claims of Duncan, Brown and Amick. Accordingly, the Clerk is directed to enter final judgment in favor of Defendant and against Plaintiffs Duncan Brown and Amick.

In summary, Defendant's motion for reconsideration is denied; Defendant's motion for certificate of immediate appeal is granted; and Plaintiff's motion for entry of final judgment against Duncan, Brown and Amick in favor of Defendant is granted.

IT IS SO ORDERED, this 31St day of May, 2005.

S/Clay D. Land
CLAY D. LAND
UNITED STATES DISTRICT JUDGE

IN THE UNITED STATES DISTRICT COURT
FOR THE MIDDLE DISTRICT OF GEORGIA
COLUMBUS DIVISION

SANDRA J. DAVIS, VELINA B. DUNCAN, ROSE BROWN AND ANNETTE AMICK,	*	
Plaintiffs,	*	
vs.	*	
VALLEY HOSPITALITY SERVICES, LLC,	*	CASE NO. 4:04-CV-20 (CDL)
Defendant	*	

ORDER

This lawsuit arises from the termination of four employees-Sandra J. Davis, Velina B. Duncan, Rose Brown and Annette Amick-from the Wyndham Hotel in Columbus, Georgia. Before the Court are Defendant's motions for judgment on the pleadings as to Plaintiffs Amick and Brown; Defendant's motions for summary judgment as to the claims of all four Plaintiffs; and Defendant's Motion to Strike Exhibits A through C of Plaintiffs' Response to Defendant's Motions for Summary Judgment. For the reasons below, the Court grants Defendant's motions for summary judgment as to all of Plaintiffs' claims except Plaintiff Davis's individual disparate treatment claims, finds that Defendant's 12(c) motions are moot, and grants in part and denies in part Defendant's Motion to Strike.

FACTUAL BACKGROUND

Plaintiffs in this case are former employees of the Wyndham Hotel ("the Wyndham") in downtown Columbus, Georgia. In recent years, the hotel has undergone a series of name, ownership, and management changes. The Wyndham was formerly the Columbus Hilton Hotel. Wyndham International took ownership of the Columbus Hilton in July 1998 and changed the hotel's name to the Wyndham Hotel in September 2002. Wyndham International operated the hotel until October 2002. In October 2002, Defendant Valley Hospitality Services, LLC ("VHS"), a hotel and food service management company, began planning to take over management of the Wyndham. VHS took over management of the hotel on November 1, 2002, planning to keep most of the Wyndham's employees to operate the hotel. As part of the VHS takeover, VHS conducted an orientation for the employees, issued new employee handbooks, and required each employee to complete a new employment application and submit to a drug test and criminal background check.

Prior to the VHS takeover, the Wyndham was organized into eight departments, each with its own department manager that reported directly to the hotel's General Manager. The eight department managers were: Front Office Manager, Executive Housekeeper, Maintenance /Chief Engineer, Director of Sales, Restaurant and Bar Manager, Chef, Banquet Manager, and Accounting Manager. Immediately after the takeover, VHS began implementing a corporate reorganization, eliminating the eight separate departments and dividing the hotel into three functional areas: sales, managed by a Sales Director; finance, managed by a Vice President of Finance; and general hotel operations, managed by the Acting General Manager. The general hotel operations division consisted of two departments: the Rooms Department, led by Rooms

Executive Bruce Raines, who is white and was 50 years old at the time of the VHS takeover, and the Food and Beverage Department, led by Food and Beverage Director Franco Brady, who is white and was over 40 years old at the time of the VHS takeover. After the reorganization, the Food and Beverage Department had four supervisory positions: Restaurant Manager, Executive Chef, Banquet Manager and Room Service Manager. After the reorganization, the Rooms Department had five supervisory positions to oversee the work of the front desk, housekeeping, bell stand, laundry, and maintenance. Brian Plemmons, who served as General Manager of the Columbus Hilton from September 1987 to October 1996, returned to the Wyndham in 2002 as President of VHS and the Acting General Manager of the Wyndham; at the time, he was 43 years old. Plemmons, who is white, was the hotel's Acting General Manager when each of the Plaintiffs was terminated from her job. In his capacity as Acting General Manager, Plemmons made the final decision to terminate each Plaintiff.

All four Plaintiffs contend that Defendant terminated older employees and African American employees because they did not have the "right look" for the hotel.[1] Plaintiffs assert claims for race and age

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[1] The "right look" theory is derived chiefly from the statement of Glenda Crawford, an African American woman who was terminated from her position as a front desk clerk sometime between January 27, 2003 and October 20, 2004. In her affidavit, Crawford stated that Rooms Executive Bruce Raines reassured her of her position on November 5, 2003 by telling Crawford she had the "look" hotel management wanted. Raines did not tell Crawford what he meant by the "right look." Crawford observed that she is "young, petite, medium built, light or fair complexion." Plaintiffs have interpreted Crawford's observation to mean that the "right look" desired by VHS

discrimination, and all four seek reinstatement (or, in the alternative, front pay) and monetary damages.

1. Plaintiff Sandra J. Davis

In August 1988, Plemmons hired Plaintiff Davis, an African American woman, to work as a Front Desk Clerk at the Columbus Hilton. Plemmons later promoted Davis to Front Office Manager in 1990. About a year later, when Davis wanted to resign from her job as Front Office Manager because of the strain it placed upon her, Plemmons allowed Davis to step down from that position and to select another position. Davis selected the PM Supervisor position, and she held that position until she resigned from the Hilton in 1993 to take a job at another hotel. In 1994 or 1995, Plemmons rehired Davis, this time as a Reservations Agent. Plemmons promoted Davis to Reservations Manager in 1996. After Plemmons left the Hilton to start his own company, a different General Manager promoted Davis to Front Office Manager. In this position, Davis reported directly to the General Manager. Davis served as Front Office Manager from November 1998 until her termination November 4, 2002. Prior to the VHS takeover, on October 31, 2002, Davis completed a VHS employment application. She applied for the "Guest Service Manager" position. On November 4, 2002, Davis was informed by Rooms Executive Bruce Raines and Human Resources Director Vickie Menza that her position had been eliminated and that she was being terminated as a result. When she was told that her position had been eliminated, Davis asked if there was any other position in

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executives includes only young, fair-skinned people. But Crawford's opinions cannot be attributed to Raines; the evidence shows only that Raines expected the front desk clerks to have a certain "look"-it does not show that Raines expected the front desk clerks to be young or fair-skinned.

the hotel for her. She was told no. At the time of her termination, Davis was 41 years old.

In her capacity as Front Office Manager, Davis managed approximately fifteen employees and oversaw five areas, including the front desk, bell staff, reservations, communications, and security. According to Defendant, the Front Office Manager position was eliminated in the reorganization, and the Front Office Manager's duties were divided between the Rooms Executive and a newly-created Front Desk Supervisor position. The new Front Desk Supervisor supervised and was responsible only for supervising the front desk and the front desk staff. The Rooms Executive was responsible for the remaining Front Office Manager functions (bell staff, reservations, communications, and security). He also supervised the Front Desk Supervisor, as well as laundry, maintenance, and housekeeping. Davis argues that her only real function as Front Office Manager was to manage the front desk. But in her deposition, Davis stated that she oversaw the front desk, PBX (communications), and reservations. (Davis Dep. at 98.) Davis also stated that before the VHS takeover, the Bell Captain resigned and that she was asked to oversee two additional areas: security and the bell staff. (Davis Dep. at 64-65, 98.)

Davis argues that her position was not truly eliminated. She contends that the "Front Office Manager" job was renamed "Front Desk Supervisor" and that the position was filled by a white woman under the age of forty. Initially, Michael Sabbs, an African American man, was selected to fill the Front Desk Supervisor position. However, Sabbs was terminated on November 6, 2002, when his drug test results came back positive. VHS brought in Amanda Fox, a 24 year-old white woman, from another VHS hotel to be the Front Desk Supervisor.

Davis posits that she was terminated because of her race and age-because she did not have the "right look." Davis brought claims under Title VII of the Civil Rights Act of 1974, 42 U.S.C. §§ 2000e, et seq. ("Title VII"), 42 U.S.C. § 1981 ("§ 1981"), and the Age Discrimination in Employment Act of 1967, 29 U.S.C.A. § 621, et seq. ("ADEA").

2. Plaintiff Velina B. Duncan

Plaintiff Duncan, an African American woman, was hired as Executive Housekeeper of the Columbus Hilton in June 2002. As Executive Housekeeper, Duncan reported directly to the General Manager and supervised approximately twenty-three employees, including Room Attendants, Housemen, a Night Lobby Attendant, a Laundry Supervisor and a Room Inspector. Duncan served as Executive Housekeeper until November 4, 2002. She completed an employment application for VHS on November 1, 2002, and she applied for the "Housekeeping Manager" position. On November 4, 2002, Duncan was informed by Rooms Executive Bruce Raines and Human Resources Director Vickie Menza that her position had been eliminated and that she was being terminated as a result. At the time of her termination, Duncan was 38 years old. Veronica Williams, an African American woman over the age of 40 who had worked for the Wyndham for several years, was transferred into the new Housekeeping Manager position.[2]

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[2]Plaintiffs characterize Williams's transfer as a "demotion" because her old position, By Request Supervisor, was a "front of the house" customer service position and her new position, Housekeeping Manager, was a "back of the house" job. However, there is no evidence that the transfer was a demotion. The new job did not result in a reduction in Williams's pay, and she received a raise 90 days after the transfer. Furthermore, in her new job, Williams was

According to Defendant, the Executive Housekeeper position was eliminated in the reorganization, and the Executive Housekeeper's duties were divided between the Rooms Executive and a newly-created Housekeeping Manager position. The new Housekeeping Manager reported to the Rooms Executive and was responsible only for supervising the housekeeping staff. The Rooms Executive was responsible for the remaining Executive Housekeeper functions, including budgeting, managing the laundry department, and managing the Housemen. Duncan maintains that her only real function as Executive Housekeeper was supervising and scheduling the housekeeping staff, though she acknowledged in her deposition that she had supervised the laundry department and that after the reorganization the laundry supervisor did not report to the Housekeeping Manager.

Duncan argues that her position was not truly eliminated. She contends that the "Executive Housekeeper" job was renamed "Housekeeping Manager" and that she was terminated because of her race-because she did not have the "right look." Duncan asserts claims under Title VII and § 1981.

3. Plaintiff Rose Brown

In May 2001, then-Front Office Manager Sandra Davis hired Plaintiff Brown, an African American woman,

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responsible for directly supervising the housekeeping staff; in her old job, she had no supervisory role. Based upon the evidence, the Court cannot conclude that Williams's transfer was a demotion. Even if it were, that is not the issue before the Court; the issue is whether Defendant discriminated against Duncan by 1) eliminating her job and 2) assigning Williams to the position most analogous to Duncan's old job.

to work as a part-time Front Desk Clerk at the Columbus Hilton. As a Front Desk Clerk, Brown was responsible for providing courteous customer service to the hotel's guests and for complying with the hotel's standards and regulations. Brown reported to Davis until November 1, 2002, when VHS began managing the hotel. After the VHS takeover, Brown reported to Front Desk Supervisor Amanda Fox, who reported to Rooms Executive Bruce Raines, who reported to Acting General Manager Brian Plemmons. On December 4, 2002, Brown was informed by Front Desk Supervisor Fox and Human Resources Director Vickie Menza that she was being discharged for violating the hotel's personal check policy and because of customer complaints regarding her work. Plemmons made the decision to terminate Brown. At the time of her termination, Brown was 55 years old.

Defendant offered two reasons for its decision to terminate Brown: first, Brown accepted a personal check for payment of room charges in violation of VHS policy, and second, Defendant received complaints from customers that Brown was rude to them and failed to provide adequate customer service. Brown contends that there was no policy forbidding acceptance of personal checks for payment of room charges, that she properly accepted a personal check pursuant to the hotel's longstanding policy, and that similarly situated white employees accepted personal checks but were not terminated. Brown also contends that she was never counseled or told about customer complaints against her until she was terminated and that the hotel received customer complaints about similarly situated white employees but did not terminate them as a result. Brown asserts claims under Title VII, § 1981, and the ADEA.

4. Plaintiff Annette Amick

Plaintiff Amick, a white woman, was hired to be the Bar Manager at the Columbus Hilton's restaurant in 1998. She was promoted to Catering Manager in 1999 and then to Restaurant Manager in 2000. Prior to the VHS takeover, Amick was responsible for overseeing the management and operation of the hotel's restaurant, bar, and room service; she managed a staff of 15 to 25 employees and reported directly to the hotel's General Manager. Amick remained Restaurant Manager when VHS took over management of the hotel in November 2002. At that time, she was 59 years old. Under the new VHS structure, the Restaurant Manager reported to Franco Brady, the Food and Beverage Director, and was responsible for coordinating, supervising, and directing the restaurant's operations, including staffing, compliance with health regulations, and responding to guest complaints. Brady reported to the hotel's Acting General Manager, Brian Plemmons.

Soon after VHS took over management of the Wyndham, Brady and Plemmons found that the restaurant was not performing well. Brady attributed many of the restaurant's problems to Amick's performance. He began counseling Amick regarding the problems, and he began keeping records of her performance deficiencies. After several months and a number of continuing problems in the restaurant, Brady issued Amick a written disciplinary warning regarding her performance. Approximately two months later, Amick's performance had not improved, and Plemmons decided to discharge her for failure to manage her department effectively. On June 24, 2003, Food and Beverage Director Brady and Human Resources Director Vickie Menza informed Amick of the discharge decision and offered Amick an opportunity to resign in lieu of being terminated. Amick accepted the offer and resigned from her position that day. At the time of her termination, Amick was 60 years old. Amick disputes Defendant's account of

her performance and contends that the problems for which she was disciplined and ultimately terminated were someone else's fault. She further argues that Brady stacked her employment file with the false write-ups so that he could fire her because of her age.

According to Defendant, there is no longer a Restaurant Manager position. Brady took over management of the restaurant, and all of the restaurant's supervisors now report directly to him. Amick contends that the Restaurant Manager position was not eliminated and that her responsibilities are now shared by two young women who fit the restaurant's "youthful image." Amick asserts a claim under the ADEA.

DISCUSSION

1. The 12(c) Motions

Plaintiffs Brown and Amick both filed for Chapter 13 bankruptcy protection in 2001, and both Plaintiffs were put on a payment plan. They both had an obligation to disclose interest in any property held by the estate after commencement of the case. See 11 U.S.C. § 541 (a) (7). Defendant argues that the doctrine of judicial estoppel applies in this case and that the claims of Plaintiffs Brown and Amick should be dismissed because both Plaintiffs failed to disclose the instant suit to the bankruptcy court until after Defendant presented its 12(c) motion.

Judicial estoppel is applied to prevent a bankruptcy debtor from receiving bankruptcy protection and then turning around to pursue claims she had previously misrepresented or failed to reveal. See, *e.g., Brassfield v. Jack McLendon Furniture, Inc.*, 953 F. Supp. 1424, 1432 (M.D. Ala. 1996). The doctrine applies to claims for damages, but the Eleventh Circuit has held that it does not apply to claims for injunctive relief. *Barger v. City of*

Cartersville, 348 F.3d 1289, 1297 (11th Cir. 2003). Therefore, Plaintiffs' claims for injunctive relief (reinstatement) are not subject to judicial estoppel. Moreover, because the Court finds that Defendant is entitled to summary judgment on all of Plaintiff Brown's and Plaintiff Amick' s claims, *see infra*, it is not necessary to reach the question whether Plaintiffs Amick and Brown should be judicially estopped from pursuing their monetary damages claims. Accordingly, Defendant's motions for judgment on the pleadings are denied as moot.

2. The Motion to Strike

Defendant has moved to strike three exhibits attached to Plaintiffs' brief in opposition to Defendant's Motion for Summary Judgment. First, Defendant seeks to strike Exhibit A-the headcount charts which had been submitted to the EEOC-arguing that the charts were not authenticated or verified as required by Federal Rule of Evidence 901. The charts provide a headcount of the Wyndham's employees before and after the VHS takeover. Both Davis and Brown swore that the charts represented a true and correct listing of managers and front desk employees before and after November 1, 2002. The Court acknowledges that Defendant has presented uncontradicted evidence which completely discredits Plaintiffs' charts. However, the Court declines at this time to strike Plaintiffs' Exhibit A. In the Court's view, the charts represent Plaintiffs' own headcount of the Wyndham's employees before and after the VHS takeover and has been adequately authenticated and verified by Plaintiffs Brown and Davis. Of course, this ruling does not foreclose Defendant from making a motion on other grounds to exclude Exhibit A from future consideration in this case, but for purposes of Defendant's Motion for Summary Judgment, the Court finds that Exhibit A should not be stricken.

Next, Defendant seeks to strike portions of Exhibit B, the affidavit of Glenda Crawford, and Exhibit C, the affidavit of Rose Brown. A court may strike portions of an affidavit that are not based upon the affiant's personal knowledge or make generalized and conclusory statements. See Fed. R. Civ. P. 56(e). Defendant claims that Crawford and Brown lacked personal knowledge as to some of their statements and that portions of their affidavits contain inadmissible generalized conclusions. Plaintiffs maintain that the affidavits are based on the witnesses' own knowledge and therefore satisfy the personal knowledge requirement of Federal Rule of Civil Procedure 56 (e). They also contend that the portions challenged as inadmissible general conclusions are supported by facts within each affiant's knowledge.

A witness may certainly testify to her own observations, and a witness may offer opinion testimony that is rationally based upon her own perceptions. See Fed. R. Evid. 701. Though a clear statement that an affidavit is based on personal knowledge would satisfy Rule 56(e)'s requirement, such a statement is not necessarily required. Personal knowledge and competence to testify may be inferred from the affidavits themselves-for example, common sense dictates that if an affiant is an employee of a company, she has personal knowledge of events and circumstances that occurred at the company within her sphere of observation. See Barthelemy v. Air Lines Pilots Ass'n, 897 F.2d 999, 1018 (9th Cir. 1990) (finding individuals' personal knowledge and competence to testify to circumstances of negotiations could be reasonably inferred from their positions and participation in the negotiations); cf. Lupo v. Wyeth-Ayerst Labs., 4 F. Supp. 2d 642, 649 (E.D. Tex. 1997) (noting that a court may infer personal knowledge from the affidavit itself but that a court need not make such an inference when other evidence indicates that the affiant did not or could not have personal knowledge of the subject matter).

Crawford stated at the beginning of her affidavit that she had been an employee of the Columbus Wyndham as a front desk clerk and PBX (communications) operator. In paragraph 2 of her affidavit, Crawford stated that after the Front Office Manager was terminated, there were rumors about the continued employment of the remaining employees. Defendant argues that this statement is based on rumors and not personal knowledge. However, the Court reads paragraph 2 to be Crawford's observation that there were rumors after Davis was terminated. Accordingly, the Court declines to strike Paragraph 2. In paragraph 4 of her affidavit, Crawford stated that "it was noticed" that individuals who were darker, older, and overweight were terminated or moved out of public view. Defendant essentially argues that because Crawford used passive voice to make this statement, it is clear that Crawford lacks personal knowledge required to support this statement. The Court disagrees and reads the statement to be Crawford's own observation of what happened after the takeover. Therefore, the Court declines to strike paragraph 4. In paragraph 6 of her affidavit, Crawford posited that her own dismissal from the Wyndham was "an effort to make a full sweep so that there would be no one left at the front from the change in management." Defendant contends that this statement is unsupported by underlying facts and is therefore an inadmissible opinion. The Court reads this statement to be Crawford' s opinion rationally based on her perceptions as a front desk clerk following the VHS takeover and therefore declines to strike paragraph 6. Defendant may, of course, seek to exclude these statements on other grounds from future consideration in this case, but for purposes of Defendant's summary judgment motion, the Court finds that Crawford's affidavit should not be stricken.

Brown's affidavit does not provide a neat context statement regarding her employment at the Columbus Wyndham as Crawford's does, but it does reflect the fact that Brown worked at the Wyndham as a front desk

employee. In paragraph 3 of her affidavit, Brown stated that "Amanda [Fox] was completely doing the job of Front Desk Manager the same as Sandra Davis had done." Brown did not assert that she had knowledge of Fox's role other than Fox's supervision of the front desk, and there is no evidence that it was within her capacity to observe whether Fox handled the additional responsibilities of the Front Office Manager. Therefore, the Court cannot conclude that Brown had personal knowledge that Fox was performing all of the functions of the Front Office Manager. Accordingly, this statement in paragraph 3 is stricken. Brown also stated in paragraph 3 that she is very soft spoken and that her customer service skills do not dictate that she would raise her voice to anyone. Defendant seeks to strike this statement as a conclusion without any underlying factual support. However, Brown obviously has knowledge of her own personal style and work habits, and she may testify about them. This statement in paragraph 3 is therefore not stricken. Finally, in the first sentence of paragraph 4, Brown stated that there "were other caucasian [sic] employees that had been written up, conselled [sic] and taken off the front desk but never let go or any other form of reprimand." Brown does not provide any information as to how this information came to her knowledge; without more facts, the Court cannot conclude that Brown's employment as a front desk clerk would have enabled her to acquire information about how other front desk employees were disciplined. Therefore, this sentence is stricken. In the second sentence of paragraph 4, Brown stated that "one person in particular was constantly rude to a guest, even on the phone, but remained employed with the hotel." Certainly, it was within Brown's capacity to observe the customer service skills of her coworker, to form an opinion based on this observation that the coworker was rude, and observe that the coworker continued to be employed by the hotel despite the transgressions which Brown perceived. Accordingly, this sentence is not stricken. Again, Defendant may still seek to

exclude the remaining statements on other grounds from future consideration in this case, but for purposes of Defendant's Motion for Summary Judgment, these statements are not stricken.

3. The Summary Judgment Motions

Summary judgment may be granted only when "the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and the moving party is entitled to a judgment as a matter of law." Fed. R. Civ. P. 56 (c). If the evidence, viewed in the light most favorable to the nonmoving party, would not permit a reasonable jury to find for the nonmovant, summary judgment may be granted in favor of the movant. *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 251-52 (1986); *Fitzpatrick v. City of Atlanta,* 2 F.3d 1112, 1115 (11th Cir. 1993). It is not enough to have *some* alleged factual dispute; there must be a *genuine* issue of material fact to defeat a motion for summary judgment. *Anderson*, 477 U.S. at 247-48. A fact is material if it is relevant or necessary to the outcome of the suit. Id. at 248. A factual dispute is *genuine* if the evidence would allow a reasonable jury to return a verdict for the nonmoving party-there must be more than "some metaphysical doubt as to the material facts." *Matsushita Electric Industrial Co., Ltd. v. Zenith Radio Corp.,* 475 U.S. 574, 586 (1986) ; *accord Anderson*, 477 U.S. at 248.

Plaintiffs in this case assert discrimination claims under Title VII, § 1981, and the ADEA. Under Title VII and the ADEA, an employer can be held liable for age and race discrimination under any one of three theories: individual disparate treatment, systemic disparate treatment, or disparate impact discrimination. *Smith v. City of Jackson,* 125 S. Ct. 1536 (2005); *Cooper v. Southern Co.*, 390 F.3d 695, 723 (11th Cir. 2004); *Hipp v. Liberty*

Nat. Life Ins. Co., 252 F.3d 1208, 1227 (11th Cir. 2001). Both disparate treatment theories require the plaintiffs to prove discriminatory intent, while the disparate impact theory does not. *Cooper,* 390 F.3d at 723. Both disparate treatment theories are also available under § 1981, but the disparate impact theory is not. Section 1981 only provides a cause of action for claims involving intentional discrimination. Id. Plaintiffs in this case argue that they have raised genuine issues of material fact as to whether Defendant engaged in systemic disparate treatment, individual disparate treatment, and disparate impact on the basis of race and age. Defendant contends that it did not discriminate against Plaintiffs on the basis of race or age and asserts that there is no genuine issue of material fact as to Plaintiffs' claims. Each type of claim is addressed below.

a. Plaintiffs Have No Disparate Impact Claims

Plaintiffs suggest-fleetingly and without much discussion-that they have presented evidence of disparate impact in the termination of African American and older employees. Disparate impact discrimination exists when a facially *neutral* employment policy adversely affects one group more than another and cannot be justified. See 42 U.S.C. 2000e-2 (k) (2005) . Under a disparate impact theory, the plaintiff need not prove intent to discriminate, but the plaintiff *must* identify specific *facially neutral* employment practices that are allegedly responsible for statistical disparities. *EEOC v. Joe's Stone Crab, Inc.*, 220 F.3d 1263, 1274 (11th Cir. 2000). Here, Plaintiffs contend that Defendant terminated Plaintiffs as part of its policy to achieve the "right look" for the hotel-and that African American and older employees did not have the "right look." This alleged policy is clearly a facially discriminatory policy and does not give rise to a claim under a disparate impact theory. *See Joe's Stone Crab*, 220 F.3d at 1278. The appropriate avenue for addressing a facially discriminatory policy allegedly responsible for

statistical disparities is a systemic disparate treatment claim, discussed infra. For these reasons, the Court grants Defendant's motions for summary judgment with regard to any disparate impact claims asserted by Plaintiffs.

b. Systemic Disparate Treatment

Plaintiffs allege that Defendant regularly and purposefully treated African American and older employees less favorably than younger and white employees-who had the "right look." The disparity in treatment allegedly occurred in Defendant's termination decisions immediately following Defendant's takeover of the Wyndham. The ultimate factual issue is whether there was a pattern or practice of such disparate treatment and, if so, whether these differences were based upon race and age. *See Int'l Brotherhood of Teamsters v. United States,* 431 U.S. 324, 335 (1977). In pattern and practice cases, the plaintiff cannot prevail simply by showing "the mere occurrence of isolated or accidental or sporadic discriminatory acts"-the plaintiff must prove that discrimination is the employer's "standard operating procedure." *Joe's Stone Crab*, 220 F.3d at 1286-87. In other words, the plaintiff must prove that the decision-maker chose his course of action at least in part because of its adverse effects on an *identifiable* group of employees. *Id.* at 1273. This is typically done through a combination of statistics and anecdotes. *Id.* at 1274, 1287. The function of the statistics-which show the fact of differences in treatment-is to rule out chance as the cause of disparity. Generally, plaintiffs seeking to introduce statistical evidence in a pattern and practice case submit a statistical analysis comparing the impacted group to similarly situated employees; such analyses are generally generated by statisticians, labor economists, or other appropriate experts. *See*, e.g., *Cooper,* 390 F.3d at 716-18 (evaluating statistical evidence consisting of expert reports by statisticians); *cf., e.g., Joe's Stone Crab*, 220 F.3d at 1270-72 (reviewing

district court's analysis of the statistical evidence, which had been completed by experts in statistics and labor economics). To be sufficient to show a pattern or practice of discrimination, a statistical analysis must be based on good data and a reliable methodology; it must be based upon a sample size large enough to yield a meaningful conclusion; and it must show that there was a statistically significant disparity in the treatment of the impacted group. *See Cooper*, 390 F.3d at 726 (finding expert's analysis to be insufficient because it was based on unreliable methodology and was not meaningfully tailored to compare similarly situated employees); *Williams v. Tallahassee Motors, Inc.*, 607 F.2d 689, 693 (5th Cir. 1979) (noting that a "'small universe' to which statistics relate may preclude significant comparisons").

Plaintiffs contend that, following the VHS takeover, there was a disparity in discharge rates of older and African American employees as compared to discharge rates of younger and white employees.[3] In support of this

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[3] A somewhat confusing matter in this case is that the impacted "group" is not uniform and thus not easily characterized as an "identifiable group" to be compared to employees outside the group as contemplated in *Joe's Stone Crab*, 220 F.3d at 1273. Plaintiffs attempt to show that there was disparate treatment of older and African American employees by lumping together employees who do not all share both of these characteristics and by grouping together managers and non-managers. Plaintiffs themselves do not form a uniform group. Only Brown, a front desk clerk, and Davis, a manager, claim that they were terminated because of race and age; Amick claims that she was terminated because of her age, and Duncan claims that she was terminated because of her race. It might have been appropriate to split Plaintiffs' impacted "group" into several separate sub-groups to determine whether there was systematic disparate treatment of older employees

contention, Plaintiffs have not presented a statistical analysis. Rather, Plaintiffs have presented what they purport to be before-and-after snapshots of two segments of the hotel's staff: front desk staff and managers. In addition to the snapshots, Plaintiffs argue that Defendant admitted to terminating a large number of older and African American employees but replacing them with mostly non-protected individuals-and that the Plaintiffs' calculations based on this alleged admission prove systemic disparate treatment in the discharge of older and African American employees.

i. The Management Snapshots

According to the "before" management snapshot, there were ten managers before the VHS takeover-two African American managers over 40, one African American manager under 40, three white managers over forty, and four white managers under 40. The "after" snapshot is a list of retained managers plus a list of managers added after November l, 2002 but before January 27, 2003 (indeed, Plaintiff Amick is still listed as "currently" employed by Defendant). According to the "after" snapshot, eight managers were retained after the VHS takeover, including one African American manager over 40, three white managers over 40 and four white managers under 40, and ten new managers were hired after the VHS takeover-all of them white, and seven of them under 40. The "after" snapshot does not contain a list of managers hired or terminated after January 27, 2003, although Plaintiffs did in their briefs add one additional terminated employee to the headcount: Plaintiff Amick. Because it appears that Plaintiffs' statistics based upon the

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only, African American employees only, older and African American employees only, or older or African American employees. Plaintiffs have not, however, presented such an analysis.

management headcount focus on the terminations and hires immediately following the VHS takeover, this omission is not critical. (*See* Pls.' Resp. to Def.'s Mot. for Summ. J. at 18 [hereinafter Pls.' Resp.].)

There are at least two major factual problems with Plaintiffs' "after" management headcount. First, Defendant has presented uncontradicted evidence that two African American employees over the age of 40, Ruby Hicks and Eric Bellamy, were promoted to management positions reporting directly to the Rooms Executive after VHS takeover. Neither Hicks nor Bellamy was listed on the headcount. Second, Defendant has also presented uncontradicted evidence that two of the new managers who Plaintiffs represented to be under 40, David Burris and Joe Buentello, were over the age of 40 when they were hired.

From the inaccurate before-and-after headcount, Plaintiffs conducted a rough statistical analysis and concluded that "[t]he percentage of managers hired as replacement [sic] for the African American managers who were initially terminated . . . is [2] vs. 0 or 0%." (Pls.' Resp. at 18.) This analysis does not factor in age. Thus, Plaintiffs are attempting to make out a case of systemic disparate treatment on the basis of race only by comparing the number of African American managers prior to the VHS takeover with the number of African American managers hired after the VHS takeover. Plaintiffs' evidence does not support this method of analyzing the data. Although Plaintiffs emphasize that most of the new managers were white, for Defendant's hiring practices to be probative, there must be evidence of a significant statistical disparity between the proportion of the impacted group in the available labor pool and the proportion of impacted group hired. *See, e.g., Joe's Stone Crab*, 220 F.3d at 1274. Plaintiffs have presented neither evidence regarding the available labor pool nor a statistical analysis regarding Defendant's hiring practices. Even if Plaintiffs had

sufficient evidence to pursue this method of analyzing the data, Plaintiffs have plugged in the wrong numbers. It is true that two African American managers were terminated, but it is also true that one African American manager was retained, and two were added.

Plaintiffs are attempting to show that there was systemic disparate treatment in the discharge of African American managers. One way to show such disparate treatment would be to show that there was a statistically significant disparity between the termination rates of African American managers and white managers. Plaintiffs have offered no evidence of the expected termination rates as compared to the actual termination rates. And though Plaintiffs posit that the "applicable standard deviations are totally one sided and virtually off the charts," they have offered no evidence of what the standard deviation from the expected outcome is and no evidence that the variance from the expected termination rate is outside the standard deviation. Furthermore, there is no evidence that the sample size is large enough to make meaningful statistical comparisons. For these reasons, Plaintiffs have failed to offer sufficient evidence to show systematic disparate treatment in the discharge of older and African American managers.

ii. The Front Desk Snapshots

According to the "before" front desk snapshot, there were seven front desk clerks-five African American clerks and two white clerks. The "after" snapshot is a list of retained front desk employees plus a list of front desk employees added after November 1, 2002 but before January 27, 2003 (indeed, Glenda Crawford is still listed as "currently" employed by Defendant). According to the "after" front desk snapshot, four of the front desk clerks-three African American clerks and one white clerk-were terminated shortly after the VHS takeover, and one African

American front desk clerk, Glenda Crawford, was terminated at some later point. VHS retained two clerks, one white and one African American. VHS hired four new front desk clerks between November 1, 2002 and January 27, 2003. All four new clerks were white. The "after" snapshot does not contain a list of front desk clerks hired or terminated after January 27, 2003, although Plaintiffs did in their briefs add one additional terminated employee to the headcount: Glenda Crawford.

From the before-and-after headcount, Plaintiffs conducted a rough statistical analysis and concluded that "[t]he number front desk employees [sic] hired as initial replacements for African-American front desk employees is 4 vs. 0 or 0%." (Pls.' Resp. at 18.) This analysis does not factor in age. Thus, Plaintiffs are attempting to make a case of systemic disparate treatment on the basis of race only by comparing the number of African American clerks prior to the VHS takeover with the number of African American clerks hired after the VHS takeover. This analytical method has the same problems as Plaintiffs' analysis of the management headcount: Plaintiffs have not presented evidence regarding the available labor pool, and they have not presented a statistical analysis regarding Defendant's hiring practices.

To prevail, Plaintiffs must show that there was systemic disparate treatment in the discharge of African American front desk employees. As discussed with regard to the managers supra, one way to show such disparate treatment would be to show that there was a statistically significant disparity between the termination rates of African American front desk clerks and white clerks. Plaintiffs have offered no evidence of the expected termination rates as compared to the actual termination rates. They have offered no evidence of what the standard deviation from the expected outcome is, no evidence that the variance from the expected termination rate is outside

the standard deviation, and no evidence that the sample size is large enough to make meaningful statistical comparisons. For these reasons, Plaintiffs have failed to offer sufficient evidence to show systematic disparate treatment in the discharge of older and African American front desk clerks.

iii. The Alleged Admission

Plaintiffs also assert that Defendant in its pleadings admitted to 1) terminating fifteen employees over the age of 40 and replacing only five of them with individuals over 40 and 2) terminating forty African American employees and replacing only seventeen of them with African American individuals. They argue that the ratios (17:40, or 42.5%, 2:15[4], or 13.3%) show a significant statistical disparity in the discharge of older and African American employees. There are three major flaws in this argument. First, it is not clear that Defendant made the admission at all. Defendant referred to these numbers as Plaintiffs' "own record analysis" and used them to make the point that there was no evidence supporting the "numerosity" requirement for a Rule 23 class. Second, the purported admission does not differentiate between job types and is not a comparison of similarly situated employees even though company-wide data cannot be used to identify discrimination within specific segments of the workforce. See Cooper, 390 F.3d at 726. Third, as discussed supra, for Defendant's hiring practices to be probative, there must be evidence of a significant statistical disparity between the proportion of the impacted group in the available labor pool and the proportion of impacted group hired, see, e.g., Joe's Stone Crab, 220 F.3d at 1274, and Plaintiff has presented neither evidence regarding the available labor pool nor a statistical analysis regarding Defendant's hiring practices. For these

[4] Plaintiffs argue that the three new executives-all of whom were over 40-should be excluded from the analysis. Because Plaintiffs' analysis of the "admission" is seriously flawed for other reasons, it is immaterial whether this exclusion was appropriate.

reasons, the purported admission is insufficient to show a significant statistical disparity in the discharge of older and African American employees.

iv. Conclusion: The Pattern and Practice Claims Fail

It is Plaintiffs' burden to produce evidence of a statistically significant disparity in the discharge of older and African American employees. As discussed above, Plaintiffs in this case have asked the Court to sift through their raw, questionable, and incomplete data and declare that this burden is satisfied. However, Plaintiffs' evidence is an insufficient basis for a proper statistical analysis regarding whether a statistically significant disparity existed. Furthermore, even if Plaintiffs' evidence did lend itself to a proper statistical analysis, it is not the Court's function to serve as Plaintiffs' expert statistician. The Court's function is to determine whether there is a genuine issue of material fact as to whether there was systemic disparate treatment. Although the absence of valid statistical evidence is not necessarily fatal to Plaintiffs' claims, *see Hipp*, 252 F.3d at 1228, Plaintiffs have presented only vague allegations of a policy of terminating older and African American employees. They did not prove that race and age discrimination were Defendant's "standard operating procedure" in making its termination decisions. The Court concludes that there is no genuine issue of material fact on this issue and that no reasonable fact finder could conclude from Plaintiffs' evidence that systemic disparate treatment on the basis of race and age occurred.[5] For these reasons, the Court grants Defendant's

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[5] Because Plaintiffs' statistical evidence is insufficient to support Plaintiffs' pattern and practice claims, it is also insufficient to support any collective action ADEA claim by Brown and Davis-such a claim depends upon the same statistical evidence.

motions for summary judgment with regard to Plaintiffs' systemic disparate treatment claims.

c. Individual Disparate Treatment.

In addition to the systemic disparate treatment claims, each Plaintiff contends that Defendant intentionally discriminated against her because of race and/or age. All four Plaintiffs rely upon circumstantial evidence to prove their claims. When a plaintiff offers circumstantial evidence to prove a Title VII, ADEA or § 1981 claim,[6] the claim is analyzed under the analytical framework established by the Supreme Court in *McDonnell Douglas Corp. v. Green*, 411 U.S. 792, 802 (1973). *Standard v. A.B.E.L. Services, Inc.*, 161 F.3d 1318, 1331 (11th Cir. 1998). Under this framework, the plaintiff must establish a prima facie case of discrimination; this creates a rebuttable presumption that the employer unlawfully discriminated against the employee because it eliminates the most common reasons for the challenged employment action. *McDonnell Douglas*, 411 U.S. at 802; *Texas Dep't of Cmty Affairs v. Burdine*, 450 U.S. 248, 253 (1981) ; *Chapman v. AI Transport*, 229 F.3d 1012, 1024 (11th Cir. 2000) (en banc). If the plaintiff establishes a prima facie case, the burden shifts to the employer to articulate a legitimate, nondiscriminatory reason for the challenged employment action. *McDonnell Douglas*, 411 U.S. at 802; *Burdine*, 450 U.S. at 254; *Chapman,* 229 F.3d at 1024. The employer's

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[6] Title VII and § 1981 "have the same requirements of proof and use the same analytical framework." *Standard v. A.B.E.L. Services, Inc.*, 161 F.3d 1318, 1330 (11th Cir. 1998); *see also Cooper*, 390 F.3d at 724 n.16. The Eleventh Circuit also uses the *McDonnell-Douglas* framework for ADEA cases. *Chapman v. AI Transport*, 229 F.3d 1012, 1024 (11th Cir. 2000) (en banc).

burden at this point is a burden of production-the employer must "clearly set forth, through the introduction of admissible evidence, the reasons for the [challenged employment action]." Burdine, 450 U.S. at 255. If the employer meets its burden of production, the presumption raised by the prima facie case is rebutted. To avoid summary judgment, the plaintiff must come forward with evidence, including evidence establishing the prima facie case, sufficient to create a "genuine issue of material fact regarding whether each of the defendant employer's articulated reasons" is pretext for discrimination. *Chapman*, 229 F.3d at 1024, 1037; see also *Burdine*, 450 U.S. at 255-256. Although a plaintiff cannot prove that the proffered reasons were pretext for discrimination simply by showing that the reasons were false, rejection of the employer's proffered reasons will in some cases permit an inference of discrimination. *St. Mary's Honor Center v. Hicks*, 509 U.S. 502, 511 (1993) ; *Reeves v. Sanderson Plumbing Products, Inc.*, 530 U.S. 133, 147 (2000) ("In appropriate circumstances, the trier of fact can reasonably infer from the falsity of the explanation that the employer is dissembling to cover up a discriminatory purpose.").

i. Plaintiff Davis

Plaintiff Davis brought claims under Title VII, § 1981 and the ADEA, alleging discriminatory discharge. Defendant discharged Davis as part of a restructuring implemented immediately following the takeover. According to Defendant, Davis's position of Front Office Manager was eliminated in the reorganization. Davis contends that the Front Office Manager position was not eliminated and that she can prove that she was discriminated against because of her age and race by showing that she was 1) a member of a protected class, 2) qualified for the position in question, 3) terminated, and 4) replaced by someone outside the protected class. See *Kelliher v. Veneman*, 313 F.3d 1270, 1275 (11th Cir. 2002).

Defendant has presented uncontradicted evidence that it did eliminate the Front Office Manager position. Defendant's evidence shows that Amanda Fox, the new Front Desk Supervisor, assumed some-but not all-of Davis's responsibilities. While Fox did assume responsibility for supervising the front desk staff, she did not assume responsibility for communications, security, the bell staff, or reservations. After the reorganization, those functions were overseen by Rooms Executive Bruce Raines and performed by either Raines or various supervisors. Davis has presented only her own conclusory statement that Fox took over her day-to-day responsibilities, and she admitted in her deposition that she had several responsibilities besides supervising the front desk staff. Davis's statement is not sufficient to refute Defendant's evidence that the Front Office Manager position was eliminated. Accordingly, the Court finds that the Front Office Manager position was eliminated. *Cf. Minton v. Am. Bankers Ins. Group*, No. 02-12942, 2003 WL 21303330, at *1 (11th Cir. 2003).

Because her position was eliminated as part of a reduction in force, to make a prima facie case of discrimination, Davis must 1) show that she was a member of a protected class, 2) show that she was qualified for her current position or to assume another position for which she applied, and 3) present evidence by which a fact finder could reasonably conclude that the employer intended to discriminate against her on the basis of race and age in making the decision. *Smith v. J. Smith Lanier & Co.*, 352 F.3d 1342, 1344 (11th Cir. 2003); Standard, 161 F.3d at 1329.

It is undisputed that Davis meets prong one of the prima facie case. Because her position was eliminated, the next question is whether Davis applied for another position for which she was qualified. Given her experience as a

front desk clerk, PM Supervisor, reservations agent, Reservations Manager, and the Front Office Manager, Davis possessed the background and skills for a variety of jobs in the front desk and reservations departments. The question is whether she applied for any of these positions. In her application, Davis applied for a "Guest Service Manager" position. Also, at the time of her discharge, Davis asked if there was anything else at the hotel she could do-that is, she expressed a general interest in any job.

An employee is generally not considered to have "applied for" a job unless she submits an application or expresses interest in a specific position. *See Smith*, 352 F.3d at 1345. In *Smith*-unlike the instant case-the plaintiff knew of various vacant positions within the company prior to her termination in a reduction in force, but she did not apply for them or express an interest in any specific job. Id. at 1344. In this case, Defendant asserts that Davis should have been aware of available positions at the hotel because it advertised about them in a local newspaper. However, the exhibit submitted by Defendant shows that the ad ran on November 3, 2002-several days after Davis completed her VHS application-and stated only that Defendant was accepting applications for a vague list of positions, including "Front Desk."

Davis did not know about the impending reorganization when she completed her VHS application. She did not know that there would be a new "Front Desk Supervisor" position; there was no way she could specifically apply for it in her application. It would strain reason to require Davis to apply for a position she did not know existed. *Cf. Carmichael v. Birmingham Saw Works*, 738 F.2d 1126, 1132 (11th Cir. 1984) (refusing to require plaintiff to apply for a job when he had no way of knowing about its availability). Accordingly, the Court finds that Davis's application for the "Guest Service Manager" position, a job with some (though not all) of the Front Desk

Supervisor responsibilities, suffices to meet prong two of the prima facie case.

To satisfy prong three of the prima facie case, Davis may point to direct evidence of discriminatory intent, or she may show that though she was qualified for and applied for an available position, the employer offered the job to someone outside the protected class. See *Jameson v. Arrow Co.*, 75 F.3d 1528, 1532 (11th Cir. 1996). Davis has not pointed to any direct evidence of discriminatory intent. Nor does the evidence establish that the Front Desk Supervisor position, a job for which Davis was qualified, was offered to someone outside the protected class-at least as part of the initial restructuring. Defendant has presented uncontradicted evidence that it selected Michael Sabbs, an African American man, to be the Front Desk Supervisor. The Court is unable to locate any evidence in the record regarding how old Sabbs was at the time of his selection. Because Davis has the burden to establish a prima facie case, the burden is on her to point to some evidence that would enable a reasonable fact finder to determine that she was replaced by someone outside the protected class. *See, e.g., Chapman*, 229 F.3d at 1024. It is undisputed that Sabbs is African American. Davis has not pointed to any evidence that Sabbs was under 40 when he was selected to be Front Desk Supervisor. Therefore, Davis has failed to meet prong three of the prima facie case for discrimination in the elimination of a position as part of a reduction in force.

That is not, however, the end of Davis's case. Two days after Sabbs was selected for the Front Desk Supervisor position, he was terminated for failing his drug test. Defendant needed to fill the position quickly, and there is no indication that the position was advertised or that additional applications were accepted for it. Defendant did not look to Davis, who had performed the Front Desk Supervisor job in addition to her other responsibilities and

had, two days before Sabbs's termination, expressed an interest in any position at the hotel. Instead, Defendant brought in Amanda Fox, a 24 year-old white woman, from another VHS hotel. Davis contends that Defendant discriminated against her on the basis of race and age by refusing to hire her to fill the Front Desk Supervisor job and by hiring Fox instead.

To make a prima facie case for failure to hire, Davis must prove that 1) she was a member of a protected class, 2) she was qualified for the open position for which she applied, 3) she was rejected despite her qualifications, and 4) Defendant hired someone outside the protected class to fill the position. *See Chapman*, 229 F.3d at 1025; see also *McDonnell Douglas*, 411 U.S. at 802. It is undisputed that Davis was a member of a protected class and qualified to be Front Desk Supervisor. The Front Desk Supervisor position came open when Sabbs was terminated, and it is undisputed that Defendant selected Fox, a young white woman, to fill the job. The only remaining question is whether Davis *applied* for the job.

Davis completed an application for "Guest Services Manager" on October 31, 2003. Then, when she was terminated on November 4, 2003, Davis expressed an interest in any job at the hotel. Based on this, the Court concludes that Davis has presented sufficient evidence to allow a fact finder to conclude that she applied for the Front Desk Supervisor position, which became open only two days after Davis was terminated. The Court does not suggest that an employer is required to consider individuals whose applications have become stale. In other words, an employer is not obligated to keep applications on file indefinitely after a position is filled and then use those applications as a pool for future hires. However, where, as here, a position becomes vacant almost immediately after it is filled and an employer must fill it on very short notice, a fact finder could reasonably determine that the original

applications are still fresh. For these reasons, the Court concludes that Davis has made a prima facie case of race and age discrimination for failure to hire.

Because Davis has established a prima facie case of race and age discrimination, the burden shifts to Defendant to articulate a legitimate nondiscriminatory reason for its decision. Defendant has failed to do so. Although Defendant has articulated a legitimate nondiscriminatory reason for the *elimination* of Davis's position (the reorganization), it has not provided a legitimate nondiscriminatory reason for its failure to rehire Davis. Defendant's argument with regard to Davis's failure to hire claim is that Davis did not apply for the job or that the job was not open when she applied for it. There is no alternative argument that, even if Davis *did* make a prima facie case for failure to hire, Defendant has a legitimate nondiscriminatory reason for its decision. Defendant contends that after Sabbs was terminated, it needed to fill the Front Desk Supervisor position on short notice. However, Defendant offered no reason why it selected to move Fox from another VHS hotel rather than rehire Davis to return to a job she had done, in addition to her other responsibilities, until two days before. Therefore, the Court finds that Defendant has failed to meet its burden of articulating a legitimate nondiscriminatory reason for failing to rehire Davis. Defendant's Motion for Summary Judgment with regard to Davis's individual disparate treatment claims is therefore denied.

ii. Plaintiff Duncan

Plaintiff Duncan brought claims under Title VII and § 1981, alleging discriminatory discharge. Defendant contends that it discharged Duncan as part of a reorganization implemented immediately following the takeover. According to Defendant, Duncan's position of Executive Housekeeper was eliminated in the

reorganization. Like Davis, Duncan contends that her position was not eliminated. However, Defendant has presented evidence that it did eliminate the Executive Housekeeper Position-this evidence shows that Veronica Williams, an African American woman over the age of 40, was transferred to the new Housekeeping Manager position and that she assumed some, but not all, of the Executive Housekeeper's functions. Williams did take over the role of supervising the housekeeping staff, but she did not assume responsibility for several other functions of the Executive Housekeeper, including oversight of the laundry. That function was given to Ruby Hicks, an African American woman over the age of 40. Duncan presented only her own conclusory statement that her day-to-day responsibilities were taken by Williams, though she did state in her deposition that Williams did not have responsibility over the laundry. Duncan's statement is not sufficient to refute Defendant's evidence that the position was eliminated. Accordingly, the Court finds that the Executive Housekeeper position was eliminated. Cf. Minton, 2003 WL 21303330, at *1.

Because her position was eliminated as part of a reduction in force, to make a prima facie case of discrimination, Duncan must 1) show that she was a member of a protected class, 2) show that she was qualified for her current position or to assume another position for which she applied, and 3) present evidence by which a fact finder could reasonably conclude that the employer intended to discriminate against her on the basis of race in making the decision. Standard, 161 F.3d at 1329.

It is undisputed that Duncan was a member of a protected class, and there is evidence showing that Duncan applied for a "Housekeeping Manager" position (exactly the title of the new position established in the reorganization). Therefore, the Court finds that Duncan has met prongs one and two of the prima facie case. However,

Duncan has not presented evidence by which a fact finder could reasonably conclude that Defendant intended to discriminate against her on the basis of race in making the decision. She has not pointed to direct evidence, and she has not shown that Defendant offered the job to someone outside the protected class. *See Jameson*, 75 F.3d at 1532. Duncan has not presented any other evidence that indicates intentional discrimination on the basis of race. The evidence establishes that Defendant selected Williams, an African American woman over the age of 40 who had worked for the hotel for several years, to be the Housekeeping Manager. Therefore, the Court finds that Duncan has~~ failed to present a prima facie case of discrimination. Accordingly, the Court grants Defendant's summary judgment motion as to Duncan's claims.

iii. Plaintiff Brown

Plaintiff Brown brought claims under Title VII, § 1981 and the ADEA, alleging discriminatory discharge due to violation of work rules. Essentially, Brown contends that Defendant fired her for certain infractions but retained white employees who committed the same infractions. A plaintiff makes out a prima facie case of discriminatory discharge due to violation of work rules by establishing that she was 1) a member of a protected class, 2) qualified for the job, 3) terminated, and 4) replaced by someone outside the protected class. *Nix v. WLCY RadiolRahall Communications*, 738 F.2d 1181 (11th Cir. 1984) (citing *Krieg v. Paul Revere Life Ins. Co.*, 718 F.2d 998, 999 (11th Cir. 1983)); see also *Cooper-Houston v. Southern Ry. Co.*, 37 F.3d 604, 605 (11th Cir. 1994). In this case, it is not disputed that Brown was a member of a protected class, terminated from her job, and replaced by a younger white front desk clerk. Defendant contends that Brown was not qualified to be a front desk clerk because she violated two of Defendant's work policies, thus falling short of several "essential functions" of a front desk clerk. Defendant

further contends that even if Brown was minimally qualified to be a front desk clerk, it had a legitimate nondiscriminatory reason for terminating her: she violated two work rules. Brown argues that she did not violate Defendant's policies and was therefore qualified for her job. She also asserts that Defendant's proffered reason for terminating her is pretextual because white employees violated the policies but were not terminated-that she and employees outside the protected class were "involved in or accused of the same or similar conduct and [were] disciplined in different ways." *Jones v. Bessemer Carraway Med. Ctr.*, 137 F.3d 1306, 1311 (11th Cir. 1998) (quoting *Holifield v. Reno*, 115 F.3d 1555, 1562 (11th Cir. 1997)).

In determining whether a plaintiff is qualified for the position, the Eleventh Circuit focuses on the plaintiff's skills and background, addressing questions about an employee's on-the-job performance as part of the second and third steps of the *McDonnell Douglas* scheme. *See Clark v. Coats & Clark, Inc.*, 990 F.2d 1217, 1227 (11th Cir. 1993). The fact that Brown had been a front desk clerk at the Wyndham for at least a year and a half and the fact that VHS hired her to be a front desk clerk after the takeover show that Brown had the skills and background necessary to be a front desk clerk. See id. Though Defendant has introduced evidence that Brown violated certain work policies, the violations do not establish that Brown was unqualified. See id. For this reason, the Court finds that Brown met the prima facie case requirement.

The Court also finds that Defendant met its burden of articulating a legitimate nondiscriminatory reason for terminating Brown. The remaining question is whether Defendant's proffered reason for terminating Brown was pretextual. To avoid summary judgment, Brown must point to evidence raising a genuine issue of material fact that Defendant's proffered reason was pretextual; this can be done by showing "such weaknesses, implausibilities,

inconsistencies, incoherencies, or contradictions in the employer's proffered legitimate reasons for its action that a reasonable fact finder could find [all the reasons] unworthy of credence." *Standard*, 161 F.3d 1318 at 1331-32. In this case, such a genuine issue of material fact does not exist.

Defendant has offered evidence showing that Plemmons, who made the decision to terminate Brown, received reports that Brown violated two separate VHS policies. First, Plemmons was informed that Brown accepted a personal check from a guest as payment for room charges. Second, Plemmons was informed that a guest had lodged a serious complaint about Brown's professionalism and customer service. After considering both reports together, Plemmons decided to terminate Brown.

In challenging Defendant's proffered reason of the guest's complaint against her, Brown contends that 1) she did not engage in the behavior resulting in the complaint, 2) the complaint was actually against Olivia O'Brien, a white front desk clerk but seized upon by VHS as a reason to terminate Brown, 3) even if there were complaints about Brown, similarly situated young white employees were not terminated for similar conduct. First, it is irrelevant whether Brown thought she was rude and unhelpful to a guest. The hotel received a credible complaint from a guest regarding Brown's conduct. In making the complaint, the guest listed a number of specific reasons why she was dissatisfied and upset by Brown's conduct. Second, there is no evidence that the complaint in question was made against O'Brien or any other white front desk clerk rather than Brown-not even Brown's deposition testimony. In fact, the evidence overwhelmingly indicates that the complaint in question was against Brown. In her affidavit, the guest, an African American woman, specifically pointed to Brown as the clerk whose conduct was so objectionable to her and stated that she was "very hesitant to complain the

job performance of minorities." Third, Brown has not pointed to evidence sufficient to create a genuine issue of material fact as to whether similarly situated white employees were treated more favorably. It is true that discrimination could be inferred if Brown identified young white employees who engaged in "nearly identical" conduct but were treated more favorably than she was. *See Nix*, 738 F.2d at 1186. However, Brown has not pointed to evidence of a single instance where the hotel received a guest complaint about a white employee but did not discharge that employee. In sum, Brown has failed to show that Defendant's proffered reason of the customer complaint was pretext for discrimination. Because Brown was required to show that *each* of Defendant's proffered reasons is pretext for discrimination in order to prevail, see *Chapman*, 229 F.3d at 1024, 1037, and because she has failed to do so, summary judgment in favor of Defendant on Brown's individual claims is appropriate.[7] Accordingly,

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[7] 'Brown has also not shown that the personal check violation was pretextual. Sufficient evidence exists supporting Defendant's contention that it had a policy forbidding acceptance of personal checks for payment of room charges. Brown certainly has not pointed to any evidence that would support her bare allegation that Defendant's contention as to the existence of a personal check policy was pretextual. As to whether Brown violated the policy, the only evidence on this matter is VHS's: Plemmons stated that Brown accepted a personal check. Brown did not state that she did not accept a personal check-she stated that she did not remember doing so. This is not enough to create a genuine issue of material fact as to whether she accepted the check. Brown also argues that even if there was a policy forbidding acceptance of personal checks and even if she accepted a personal check in violation of that policy, Amanda Fox, a young white employee, accepted a personal check for payment of room charges but was not fired. Again, intentional discrimination

the Court grants Defendant's summary judgment motion as to Brown's individual disparate treatment claims.

iv. Plaintiff Amick

Plaintiff Amick brought claims under the ADEA, alleging discriminatory discharge. A plaintiff makes out a prima facie case of discriminatory discharge on the basis of age by establishing that she was 1) a member of a protected class, 2) qualified for the job, 3) terminated, and 4) replaced by someone outside the protected class. *See Kelliher*, 313 F.3d at 1275; see also *McDonnell Douglas*, 411 U.S. at 802. It is undisputed that Amick was a member of a protected class and terminated from her job. Defendant contends that Amick fails to meet prongs two and four.

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can be inferred if two employees-one in the protected class and one outside the protected class-engage in "nearly identical" conduct but the protected class employee is disciplined more harshly. See Nix, 738 F.2d at 1186. In support of her contention that Fox engaged in nearly identical conduct, Brown points to the statement of Glenda Crawford, a former front desk employee who overheard Rooms Executive Bruce Raines chastising Fox for accepting a check. Fox was not fired for this alleged infraction. Crawford's statement does not establish that Fox and Brown were similarly situated; the statement does not indicate that the check in question was a personal check, and it does not indicate that the check was accepted for payment of room charges. Furthermore, even if Fox did accept a personal check for room charges, Plemmons made the decision to terminate Brown because of the check policy violation and because of the customer complaint against her. There is no evidence of customer complaints against Fox-therefore, it cannot be said that the two women engaged in "nearly identical" conduct.

First, Defendant argues that Amick fails to make out a prima facie case because she was not qualified for the position. In support of this contention, Defendant points to a series of performance problems Amick had after the VHS takeover. As discussed above, the Eleventh Circuit focuses on a plaintiff's skills and background in determining whether the plaintiff was qualified for the position in question. Clark, 990 F.2d at 1227. Questions about an employee's job performance are addressed as part of the second and third steps of the *McDonnell Douglas* scheme. Amick had worked for the hotel's restaurant off and on since 1985, working her way up to Restaurant Manager twice. She served as Restaurant Manager for a number of years. She was kept on after the VHS takeover. Therefore, it is clear that Amick had the skills and background required to be the Restaurant Manager. See id. For this reason, the Court finds that Amick meets prong two of the prima facie case requirement.

Next, Defendant argues that Amick fails to make out a prima facie case because she was not replaced with younger employees. Defendant has presented evidence that it eliminated the Restaurant Manager position and that Food and Beverage Director Franco Brady took over management of the restaurant. After Amick's termination, the restaurant supervisors, including two young white women who were hired after the VHS takeover, reported directly to Brady. Amick has not presented any evidence other than her own conclusory statements that the two young women took over her day to day responsibilities. Therefore, the Court cannot find that she was replaced by someone outside the protected class, and prong four of the prima facie case is not present.

Even if Amick had made out a prima facie case, the Court finds that Defendant has articulated a legitimate nondiscriminatory reason for terminating Amick: Plemmons's good faith belief that Amick's performance

was unsatisfactory. *See Clark*, 990 F.2d at 1228 (noting that an employer's good faith belief that the employee's performance is unsatisfactory is a legitimate nondiscriminatory reason for termination). The Court further finds that Amick has not pointed to evidence showing that the proffered reason is pretext for discrimination. *See id.*

In support of its contention that the hotel's executives believed that Amick's performance was unsatisfactory, Defendant submitted a series of memoranda from Brady to Amick regarding recurring problems in the restaurant, including understaffing of the restaurant, excessive use of overtime by the restaurant staff (due to understaffing), high turnover of restaurant staff, lack of training for restaurant staff, improper accounting procedures, and issues with food quality. On April 25, 2003, Brady issued a written warning to Amick in the form of an Employee Corrective Counseling Form, and he met with Amick to discuss the problems; the warning focused on problems with shift staffing and understaffing in general. According to Brady and Plemmons, the problems addressed in the memos and the warning were Amick's responsibility, and they believed that her performance was deficient because she failed to correct the problems.

Although Amick in her briefs and her counter statement of material facts argues that the problems attributed to her were not her responsibility and were therefore pretext for discrimination, the evidence suggests that most, if not all, of the problems were Amick's responsibility. Amick acknowledged in her deposition that the restaurant was constantly understaffed, that the understaffing led to overtime problems, and that Brady continually asked her to hire more staff. She indicated that

one of her responsibilities was to hire restaurant staff.[8] She also pointed to five memos that contained problems she considered to be her responsibility and her fault. These memos covered staffing and overtime; accounting problems; and particular problems with food quality, including a breakfast buffet where there was a live roach in the bread basket. According to Amick, these problems-even the ones she admitted were her fault-did not warrant her termination. However, it is well established that where, as here, the proffered reason is one that might motivate a reasonable employer to terminate an employee, the plaintiff cannot establish pretext merely by questioning the wisdom of the employer's reason. *See Chapman*, 229 F.3d at 1030. Accordingly, the Court finds that Amick has not presented sufficient evidence for a fact finder to conclude that Defendant's reason was pretextual. For these reasons, the Court grants Defendant's Motion for Summary Judgment as to Amick' s claims.

CONCLUSION

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[8] Amick's testimony regarding her responsibilities is somewhat inconsistent, but it does indicate that hiring was one of her responsibilities-even though she tried to deny it. When she wrote out her job description for Brady, Amick included hiring and staffing among her responsibilities. She stated at one point during the deposition that hiring was part of her job but stated at other points that hiring was not part of her job and that it was a job for the Human Resources Department. Amick acknowledged throughout the deposition that Brady asked her repeatedly to hire more staff for the restaurant; she acknowledged that it was her responsibility to interview prospective employees and to work with Human Resources to address her staffing needs; she stated that she took on the job of hiring restaurant staff; and she acknowledged that though Brady expected her to go out and recruit new employees, she did not do such recruiting.

The Court finds that Defendant's 12(c) motions are moot. The Court grants Defendant's Motion to Strike as to Brown's affidavit testimony regarding Amanda Fox's job responsibilities and as to Brown's affidavit testimony regarding discipline of Caucasian employees in general. The Court denies the remainder of Defendant's Motion to Strike. The Court grants Defendant's Motion for Summary Judgment as to Plaintiffs' disparate impact and systemic disparate treatment claims. The Court also grants Defendant's motions for summary judgment as to the individual disparate treatment claims of Plaintiffs Duncan, Brown, and Amick. The Court denies Defendant's Motion for Summary Judgment as to the individual disparate treatment claims of Plaintiff Davis, which are the only claims remaining in this case.

IT IS SO ORDERED, this 25th day of April, 2005.

S/Clay D. Land
CLAY D. LAND
UNITED STATES DISTRICT JUDGE

IN THE UNITED STATES DISTRICT COURT
FOR THE MIDDLE DISTRICT OF GEORGIA
COLUMBUS DIVISION

SANDRA J. DAVIS, VELINA B. DUNCAN, ROSE BROWN and ANNETTE AMICK,	*	
Plaintiffs,	*	
vs.	*	
VALLEY HOSPITALITY SERVICES, LLC,	*	CASE NO. 4:04-CV-20-2 (CDL)
Defendant	*	

ORDER

On June 10, 2004, the Court entered an Order that dismissed Plaintiffs' claims for which Plaintiffs sought class certification pursuant to Rule 23 of the Federal Rules of Civil Procedure. Accordingly, Plaintiffs' previously filed Motion for Class Certification is denied as moot.[1]

IT IS SO ORDERED, this 23" day of June, 2004.

S/Clay D. Land
CLAY D. LAND
UNITED STATES DISTRICT JUDGE

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[1] This ruling does not affect Plaintiffs' collective action AREA claims which the Court has not dismissed. The Court notes that no motion has been filed by Plaintiffs to proceed with their ADEA claims as a collective action.

IN THE UNITED STATES DISTRICT COURT
FOR THE MIDDLE DISTRICT OF GEORGIA
COLUMBUS DIVISION

SANDRA J. DAVIS, VELINA B. DUNCAN, ROSE BROWN and ANNETTE AMICK,	*	
Plaintiffs,	*	
vs.	*	
VALLEY HOSPITALITY SERVICES, LLC,	*	CASE NO. 4:04-CV-20-2 (CDL)
Defendant	*	

ORDER

Plaintiffs in the above captioned lawsuit assert individual claims against Defendant, Valley Hospitality Services, LLC ("Valley Hospitality"), pursuant to Title VII and the Age Discrimination in Employment Act ("AREA"). Plaintiffs have also asserted, through an amendment to their Complaint, a putative class claim under Title VII and a putative collective action under the ADEA. Defendant seeks dismissal of Plaintiffs' class-wide claims, contending that Plaintiffs failed to include such claims in their charges of discrimination filed with the Equal Employment Opportunity Commission ("EEOC"). Defendant also seeks dismissal of any age discrimination claims alleged individually by Plaintiffs Davis or Duncan. For the following reasons, the Court grants Defendant's motion as to Plaintiffs' putative Title VII class action claims and as to Plaintiff Duncan's purported individual and collective action claims under the

ADEA. The Court denies Defendant's motion to dismiss Plaintiff Davis's individual and collective action claims under the ADEA and denies Defendant's motion to dismiss Plaintiff Brown's collective action claim.

BACKGROUND

Defendant purchased the hotel at which Plaintiffs were employed. Subsequent to that change in ownership, Defendant terminated Plaintiffs' employment. Davis and Duncan were fired on November 4, 2002. Brown was fired on December 4, 2002, and Amick was fired on June 24, 2003.

Davis and Duncan both filed charges of discrimination with the EEOC on November 19, 2002, claiming Defendant discriminated against them because of their race. Brown filed her EEOC charge on December 31, 2002, alleging race and age discrimination. Amick filed her EEOC charge on September 12, 2003, based upon alleged age discrimination.[1] None of these EEOC charges alleged that Defendant's discrimination was class-wide; nor did they seek to assert claims on behalf of employees other than themselves as part of their EEOC charges.

On January 27, 2003, before Amick had filed her EEOC charges but after Davis, Duncan, and Brown had filed their charges, Plaintiffs' attorney wrote a letter to the EEOC giving a "preliminary statement" of Davis's, Duncan's, and Brown's charges. In that letter, the attorney described for the first time allegations that Defendant engaged in class-wide discrimination as to race and age. Plaintiffs' attorney in this letter sought "to amend [Davis's, Duncan's, and Brown's] EEOC charges to add age and gender discrimination to the

[1] 'Plaintiff Amick's EEOC charge does not allege any facts supporting a collective action under the ADEA.

filed racial discrimination charges for themselves and all other similarly situated employees who have been discriminated against by Valley Hospitality."[2] Neither Plaintiffs nor their attorney took any further action to amend their EEOC charges.

The EEOC mailed Davis, Duncan, and Brown their right to sue letters on July 21, 2003.[3] Amick's right to sue letter was sent subsequently on October 30, 2003. Davis, Duncan, and Brown filed this lawsuit on August 18, 2003. Amick was added as a plaintiff by amendment on February 10, 2004.

Defendant contends that Plaintiffs' class-wide discrimination claims must be dismissed because Plaintiffs never filed a valid charge of class-wide discrimination with the EEOC prior to filing suit. Defendant also argues that Plaintiff Davis's individual ADEA claim must be dismissed because she did not properly assert those claims to the EEOC. Defendant further maintains that Plaintiff Duncan's AREA claims should be dismissed because she was under forty years of age at the time her employment was terminated. Plaintiff Duncan now states that she never intended to assert a claim under the AREA. To avoid confusion, the Court therefore dismisses that claim.

Regarding Plaintiffs' class-wide discrimination claims and Plaintiff Davis's individual ADEA claim, Plaintiffs contend that their attorney's January 27 letter to the

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[2] A factual dispute exists as to when a copy of this letter was provided to Defendant and/or its attorney. The resolution of this dispute is unnecessary for the determination of the present motion.

[3] The only checked box on Plaintiff Davis's and Duncan's right to sue letters was the entry for Title VII claims. However, a right to sue letter is not a necessary prerequisite for suit under the ADEA. See Grayson v. K Mart Corp., 79 F.3d 1086, 1100 (11`h Cir. 1996).

EEOC constitutes a valid charge and/or amendment under the applicable EEOC regulations. Therefore, Plaintiffs argue that the class-wide claims and Davis's individual AREA claim, which are included in that letter, should not be dismissed.

DISCUSSION

Plaintiffs, Title VII Class-wide Discrimination Claims

A plaintiff must file a charge of discrimination with the EEOC prior to filing a lawsuit seeking relief under Title VII. 42 U.S.C. § 2000e-5(e). Furthermore, the EEOC charge must comply with the requirements of Title VII and the EEOC regulations promulgated thereunder, including the requirement that any charge must be verified or made under oath and be in writing. See 42 U.S.C. § 2000e-5 (b) ; 29 C.F.R. §§ 1601.9, 1601.3 (a). This requirement cannot be waived. *See Vason v. City of Montgomery*, Ala., 240 F. 3d 905 (11th Cir. 2001).

It is undisputed that none of the Plaintiffs included allegations of class-wide discrimination in their verified EEOC charges. Therefore, the issue presented by Defendant's motion is whether the January 27 letter from Plaintiffs' attorney to the EEOC, which does allege class-wide discrimination, constitutes a valid "charge of discrimination" or is a valid amendment to the previously filed charges.

The Court finds that the attorney letter is not a valid EEOC charge of class-wide discrimination under Title VII. Any charge with the EEOC alleging discrimination under Title VII must be made under oath or affirmation. See Vason, 240 F.3d at 907. The letter was not verified, and no attempt has been made to "amend" it to include a

verification. Consequently, the January 27 attorney letter was not a valid EEOC charge of discrimination.

The Court also finds that the letter was not a valid amendment of the previously filed charges. "A charge may be amended to cure technical defects or omissions, including the failure to verify the charge, or to clarify and amplify allegations made therein." 29 C.F.R. § 1601.12(b). Because no allegations of class-wide discrimination were included in Plaintiffs' original charges, the January 27 letter does not "clarify or amplify" any of the original charges' allegations. *See, e.g., Cheek v. W. and S. Life Ins. Co.*, 31 F. 3d 497, 503 (7th Cir. 1994)("Pursuant to 29 C.F.R. § 1601.12(b), . . .additional allegations cannot expand the scope of the allegations in (the plaintiff's] original charge; they only may "clarify or amplify" the allegations (already] in the charge."). The January 27 letter clearly seeks to add new separate charges of class-wide discrimination. It does not seek to clarify or amplify the previous allegations. Consequently, the letter does not constitute a valid amendment.

The Court also finds that Plaintiffs' original charges were insufficient to place the Defendant or the EEOC on reasonable notice that class-wide discrimination would be relevant to any of Plaintiffs' individual claims. Therefore, any investigation by the EEOC of the original charges would not have reasonably extended to encompass the class-wide discrimination claims. See Grayson v. K Mart Corp., 79 F.3d 1086, 1107 (11th Cir. 1996) ; Cf. Sanchez v. Standard Brands, Inc., 431 F.2d 455, 465-66 (5th Cir. 1970) (allowing the scope of the plaintiff's action to exceed the technical claims in her EEOC charge because a reasonable investigation by the EEOC based upon the plaintiff's charge would have discovered a sufficient basis for the plaintiff's additional claims).

In summary, the January 27 letter did not comply with Title VII ,s charge and amendment requirements. Since

no valid EEOC charge of class-wide discrimination prohibited by Title VII has been filed, those claims must be dismissed.

Plaintiffs' AREA Individual and Collective Action Claims

It would appear that the foregoing analysis should also apply to Plaintiffs' ADEA claims. However, although the charge requirements under Title VII and the AREA are similar, a significant difference exists that ultimately requires a different outcome. *See, e.g., Hipp v. Liberty Nat. Life Ins. Co.*, 252 F.3d 1208, 1221 n.10 (11th Cir. 2001). Unlike the Title VII regulations, neither the ADEA nor the EEOC regulations promulgated thereunder require a verification of the written charge of discrimination by the claimant. *See Wilkerson v. Grinnell Corp.*, 270 F. 3d 1314, 1321 n.3 (11th Cir. 2001) ; see also 29 C.F.R. §§ 1626.1 et seq. Consequently, the lack of verification of the January 27 attorney letter is not fatal to Plaintiffs' ADEA claims as it was to Plaintiffs' Title VII class claims.[4] The Court must therefore determine whether the letter otherwise complies with the AREA and EEOC charge requirements.

EEOC regulations define the term "charge" as a "statement filed with the Commission by or on behalf of an aggrieved person which alleges that the named prospective defendant has engaged in or is about to engage in actions in violation of the Act." 29 C.F.R. 1626.3. This charge should include pertinent information about the person making the charge and the person against whom the charge is made, as

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[4] The Court can conceive of no legitimate reason for this difference in the charge requirements for ADEA and Title VII claimants. However, this Court is obliged to apply the law even if it is contrary to the Court's personal notions of common sense.

well as a concise statement of the facts and other information about the proceeding and the employer. See 29 C.F.R. § 1626.8 (a). However, if the charge is reduced to writing, names the prospective respondent, and generally alleges the complained of discriminatory conduct, the charge should be deemed sufficient. See 29 C.F.R. § 1626.8(b); 29 C.F.R. S 1626.6.

The attorney letter of January 27 is in writing, names the prospective respondent, and details the class-wide age-based discrimination that Plaintiffs allege occurred. The letter was also timely sent to the EEOC. Therefore, the letter constitutes a valid charge under the AREA and EEOC regulations.

Defendants argue that even if the letter contained all of the elements of a valid charge, Plaintiffs' claims asserted for the first time in the letter should still be dismissed because it did not receive pre-litigation notice of the attorney letter. Although one of the purposes underlying the charge requirements is to provide employers with prompt notice of an employee's allegations of unlawful conduct, the Court finds that under the circumstances of the case at bar Plaintiffs should not be penalized for the EEOC's failure to process and to notify the employer of Plaintiffs' charges included in the attorney letter. *See, e.g, Forehand v. Fla. State Hosp. at Chattahoochee*, 89 F.3d 1562, 1570 (11th Cir. 1996) ("Title VII does not condition an individual' s right to sue upon the EEOC' s performance of its administrative duties."); see also Albano v. Schering-Plogh Corp., 912 F.2d 384, 388 (9th Cir. 1990) ("It is the EEOC, not the claimant, who is responsible for notifying the employer of the claims alleged in the EEOC charge . . . . Thus, the claimant should not now be penalized because of the EEOC's own errors.") ; *Steffen v. Meridian Life Ins. Co.*, 859 F.2d 534, 544 (7th Cir. 1988) (ADEA action should proceed regardless of EEOC's failure to act because plaintiff's intake questionnaire contained all necessary information and plaintiff made clear

to the EEOC officer that he intended to activate the ADEA's machinery.).

The Court finds that the January 27 attorney letter constitutes a valid charge of discrimination under the ADEA. Therefore, Defendant's motion to dismiss Plaintiff Davis and Brown's putative ADEA collective action and Davis's individual ADEA claim is denied.

CONCLUSION

Defendant's motion to dismiss Plaintiffs' claims of class-wide Title VII discrimination is granted. Defendant's motion to dismiss Plaintiff Duncan's individual claim of age discrimination is granted. Defendant's motion to dismiss Plaintiffs' collective action AREA claims is denied. Defendant's motion to dismiss Plaintiff Davis's individual ADEA claim is denied.

IT IS SO ORDERED, this 10th day of June, 2004.

S/Clay D. Land
CLAY D. LAND
UNITED STATES DISTRICT JUDGE

No. 06-1129

Supreme Court, U.S.
FILED
MAR 16 2007
OFFICE OF THE CLERK

In The

Supreme Court of the United States

SANDRA J. DAVIS, VELINA B. DUNCAN, ROSE BROWN, AND ANNETTE AMICK,

Petitioners,

v.

VALLEY HOSPITALITY SERVICES, LLC,

Respondent.

On Petition For Writ Of Certiorari To The United States Court Of Appeals For The Eleventh Circuit

BRIEF IN OPPOSITION

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QUESTIONS PRESENTED

I. Whether Petitioners have presented compelling reasons to grant the Petition where the Eleventh Circuit's Opinion, which affirms the District Court's denial of class certification on the ground that the EEOC charge did not provide adequate notice of class action claims, does not conflict with a decision of this Court or a Court of Appeals, and where Petitioners do not claim that the Eleventh Circuit's ruling implicates an important federal question that has not been settled by this Court.

II. Whether Petitioners have presented compelling reasons to grant the Petition where the Eleventh Circuit's Opinion, which affirms the District Court's dismissal of Petitioners' systemic disparate treatment claims based on a lack of sufficient evidence, does not conflict with a decision of this Court or a Court of Appeals, and where Petitioners do not claim that the Eleventh Circuit's ruling implicates an important federal question that has not been settled by this Court.

III. Whether Petitioners have presented compelling reasons to grant the petition where the Eleventh Circuit's Opinion, which affirms the District Court's dismissal of their individual disparate treatment claims, does not conflict with a decision of this Court or a Court of Appeals, and where Petitioners do not claim that the Eleventh Circuit's ruling implicates an important federal question that has not been settled by this Court.

QUESTIONS PRESENTED – Continued

IV. Whether Petitioners have presented compelling reasons to grant the Petition where the Eleventh Circuit's Opinion, which reverses the District Court's denial of summary judgment to Respondent on Petitioner Davis' failure-to-hire claim, does not conflict with a decision of this Court or a Court of Appeals, and where Petitioners do not claim that the Eleventh Circuit's ruling implicates an important federal question that has not been settled by this Court.

PARTIES TO THE PROCEEDINGS AND RULE 29.6 STATEMENT

There are no parties to the proceeding other than those listed in the caption. There is no parent or publicly held company owning 10% or more of the stock of Valley Hospitality Services, LLC.

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BRIEF IN OPPOSITION

SUMMARY OF REASONS TO DENY THE PETITION

No compelling reason exists to grant the Petition in this case. There is no conflict between the Eleventh Circuit's decision and a decision of any other United States Court of Appeals, a state court of last resort, or this Court. Nor has there been any departure from the accepted and usual course of judicial proceedings. Lastly, this case does not involve an important question of federal law that has not been, but should be, decided by this Court. Rather, the Petition is based on the Petitioners' dissatisfaction with the lower courts' factual findings and application of properly stated law. Accordingly, the Petition should be denied.

Petitioners assert as one of their grounds for granting the Petition that the Eleventh Circuit has failed to recognize this Court's decision in *Ash v. Tyson Foods, Inc.*, 546 U.S. 454 (2006). According to Petitioners, *Ash* held that "a plaintiff's prima facie case, combined with sufficient evidence to find that the employer's asserted justification is false, may permit the trier of fact to conclude that the employer unlawfully discriminated." Pet. Br. at p. 5. Petitioners miscite this Court's holding. In *Ash*, this Court held that modifiers or qualifications are not necessary in all cases to render the term "boy" probative of bias, and that the Eleventh Circuit's "slap you in the face" standard for pretext was imprecise and insufficient. The Eleventh Circuit's decision here does not conflict with the holding in *Ash*.

Petitioners further contend that the Eleventh Circuit's holding in this case conflicts with its previous holding in *Grayson v. K-Mart*, 79 F.3d 1086 (11th Cir. 1986), and with

the Sixth Circuit's holding in *Howlett v. Holiday Inns, Inc.*, 49 F.3d 189, 194-97 (6th Cir. 1995). In *Grayson*, the Eleventh Circuit held that it would apply the single filing rule to Age Discrimination in Employment Act ("ADEA") cases such that "a grievant who had not filed an Equal Employment Opportunity Commission ("EEOC") charge could opt into a class action by piggybacking onto a timely charge filed by one of the named plaintiffs in the class action." *Grayson*, 79 F.3d at 1101. The Eleventh Circuit further held that for a charge to have adequately alleged classwide discrimination, "there must be some indication that the grievance affects a group of individuals defined broadly enough to include those who seek to piggyback on the claim, and the charge must alert the EEOC that more is alleged than an isolated act of discrimination." *Grayson*, 79 F.3d at 1107 (citing *Tolliver v. Xerox Corp.*, 918 F.3d 1052, 1058 (2d Cir. 1990)) (internal quotation marks omitted). Similarly, the Sixth Circuit held in *Howlett v. Holiday Inns, Inc.*, 49 F.3d 189 (6th Cir. 1995), that the single filing rule applies in ADEA cases and that the EEOC charge is sufficient to support piggybacking "if it contains sufficient information to notify prospective defendants of their potential liability and permit the EEOC to attempt informal conciliation of the claims before a lawsuit is filed." *Id.* at 195. In this case, the District Court and the Eleventh Circuit held that the EEOC charges did not provide sufficient notice of the class action allegations. These holdings are not inconsistent with *Grayson* or *Howlett*. Rather, they are the result of the proper application of properly stated law.

Lastly, Petitioner alleges that the Eleventh Circuit's decision conflicts with this Court's decision in *Hazelwood*

School District v. United States, 433 U.S. 299 (1977). In *Hazelwood*, this Court held that

> the Court of Appeals erred in disregarding the post-Act hiring statistics in the record, and that it should have remanded the case to the District Court for further findings as to the relevant labor market area and for an ultimate determination of whether Hazelwood engaged in a pattern or practice of employment discrimination after March 24, 1972.

Id. at 313. In this case, the Eleventh Circuit affirmed the District Court's decision denying Petitioners' systemic disparate treatment claims because it found Petitioners' evidence – both statistical and otherwise – to be clearly inadequate. Pet. Br. at p. A-11. There is no conflict between the Eleventh Circuit's decision in this case and the holding in *Hazelwood*.

The Court should therefore deny the Petition because the case does not qualify for or otherwise merit review.

STATEMENT OF THE CASE

I. NATURE OF THE CASE

Petitioners Davis and Brown assert that Respondent discharged them on the basis of race and age in violation of Title VII of the Civil Rights Act of 1964, 42 U.S.C. § 2000e, as amended ("Title VII"), 42 U.S.C. § 1981 ("Section 1981"), and the Age Discrimination in Employment Act, 29 U.S.C. §§ 621-634 ("ADEA"). Petitioner Amick alleges that Respondent discharged her on the basis of age in violation of the ADEA, and Petitioner Duncan alleges

that Respondent discharged her on the basis of race in violation of Title VII and Section 1981.[1]

II. STATEMENT OF FACTS

A. Respondent Takes Over The Wyndham And Discharges Petitioners Duncan And Davis.

In October 2002, Respondent, a hotel and food service management company, began planning to take over management of the Columbus Wyndham Hotel, a 177-room facility located in downtown Columbus, Georgia. (R-62 ¶¶ 1, 11-16.) On November 1, 2002, Respondent took full control of the Wyndham and conducted an orientation for all its employees. (R-67 p. 43; R-62 ¶ 18.) Each employee was required to complete a new employment application and submit to a drug test and a criminal background check as a condition of employment with Respondent. (R-67, p. 43, Ex. 1; R-62 ¶ 16.)

Over the next few days, Respondent reorganized the Wyndham, eliminating its eight separate departments and dividing the hotel into three functional areas: sales, finance, and general hotel operations. (R-62 ¶ 20.) Under the new structure, the sales division was managed by the Sales Director and the finance division was managed by the Vice President of Finance. (R-62 ¶ 20.) Brian A. Plemmons ("Plemmons"), the Acting General Manager, took over responsibility for general hotel operations, which were divided into two separate departments: the Rooms Department and the Food and Beverage Department. (*Id.*)

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[1] Petitioner Duncan's Amended Complaint also asserted a claim for age discrimination, but the District Court dismissed this claim because she was not over 40 at the time of her termination. (R-41.)

The Food and Beverage Department was managed by a Food and Beverage Director, Franco Brady, who reported to Plemmons and who, among other things, was responsible for overseeing the Restaurant Manager, the Executive Chef, the Banquet Manager and Room Service. (R-62 ¶¶ 21-22.)

The Rooms Department was managed by a Rooms Executive, a newly created position that was filled by Bruce Raines. (R-62 ¶ 17; R-67, pp. 93-96, 141.) Raines reported to Plemmons and was responsible for several of the duties previously assigned to the Front Desk Manager and Executive Housekeeper. In addition, he managed Reservations, Communications, the Concierge, and Security and oversaw the work of the Front Desk Supervisor, the Housekeeping Supervisor, the Bell Captain, the Laundry Supervisor, and the Maintenance Supervisor. (R-67 pp. 30, 32, 64, 67, 80-81; R-67 pp. 93-96; R-62 ¶¶ 23, 27.)

As a result of this restructuring, Respondent eliminated the Executive Housekeeper position held by Petitioner Duncan and the Front Desk Manager position held by Petitioner Davis. (R-67 pp. 93-96, 145; R-62 ¶¶ 23, 26.) Both Petitioner Duncan and Petitioner Davis were informed on November 4, 2004 that their positions were being eliminated and they were being discharged as a result. (R-67 pp. 70-71, 81-85, 90-96; R-62 ¶ 26; R-66, pp. 67, 71-72.)

The duties of the Executive Housekeeper were divided between Rooms Executive Bruce Raines and a new Housekeeping Manager position. Raines assumed the duties of budgeting, and managing the laundry department and the Housemen. The Housekeeping Manager, who reported

directly to Raines, supervised the housekeeping staff and maintained their schedules. (R-62 ¶¶ 27, 29-30.) Veronica Williams, an African American supervisor in the protected age group who had worked at the Hotel for several years, transferred into the newly-created Housekeeping Manager position. (R-67 pp. 76, 82, 84-87; R-62 ¶ 31.) Unlike the Executive Housekeeper, Ms. Williams did not have any authority over the Laundry. Instead, Respondent created a new Laundry Supervisor position that reported to the Rooms Executive. That position was filled by Ruby Hicks, a long-time African American employee who, like Ms. Williams, was well over 40. (R-67 pp. 76-81; R-62 ¶¶ 29, 32.)

The Front Office Manager duties were divided between Raines and a newly-created Front Desk Supervisor position. (R-66, pp. 99-101, 156; R-62, ¶¶ 23-24, 27-28.) Unlike the Front Office Manager, the Front Desk Supervisor reported to the Rooms Executive and was only responsible for supervising the Front Desk and the Front Desk Clerks. The new Front Desk Supervisor did not supervise the Bell Captain and was not responsible for Reservations, Communications or Security. (R-62, ¶¶ 27-28.) The Front Desk Supervisor also earned substantially less than the Front Office Manager. (R-62, ¶ 30.)

Michael Sabbs, an African American, was selected to fill the lower-level Front Desk Supervisor position. He held that position for two days before his drug screening test results came back positive and he was discharged on November 6, 2002. (R-62, ¶ 33.) Sabbs was replaced by Amanda Fox, a twenty-four-year-old white female who transferred to the Wyndham from another of Respondent's hotels. (R-62, ¶ 34.)

During the reorganization of the Wyndham, a number of lower-level supervisory positions were created, and some previously-existing management and supervisory positions were retained. Many of these positions were filled by minorities and those over the age of 40, including Laundry Supervisor Ruby Hicks (African American, over 40); Bell Captain Eric Bellamy (African American, over 40); Banquet Captain Janta Marshall (African American, over 40); Banquet Manager Birgit Johnson (white, over 40); Food and Beverage Supervisor Meronica Price (African American); Human Resources Director Vickie Menza, (Asian American, over 40); Restaurant Manager Petitioner Annette Amick (white, over 40); and Director of Sales Marilyn Rivera (Hispanic, over 40). (R-67, pp. 76-81; R-62, ¶ 32, 35.)

B. Petitioner Brown Is Discharged For Performance Problems

Petitioner Brown, a Front Desk Clerk at the Wyndham, was hired by Respondent on Friday, November 1, 2002. (Brown Dep. pp. 16, 48-49, 51-52, Ex. 2; R-62 ¶¶ 15, 16.) Like other employees hired by Respondent, Petitioner Brown was subject to a 90-day probationary period. (R-64; R-62, ¶¶ 16, 18.) Respondent, however, began receiving complaints about Petitioner Brown's performance almost immediately.

In November 2002, Raines orally counseled Petitioner Brown regarding complaints he received from Hotel guests about her rude behavior towards them. (R-62 ¶ 37.) Following this counseling, Lisa Lyons-Ward, an African American attorney who frequently stayed at the Wyndham and whose organization often used the Hotel's facilities,

complained to Rooms Executive Bruce Raines and Director of Sales Marilyn Rivera about a series of incidents involving Petitioner Brown and stated that Petitioner Brown was the rudest employee she had ever encountered in any hotel. Raines personally apologized to Ms. Lyons-Ward and later reported Ms. Lyons-Ward's complaint to Plemmons. (R-62 ¶ 37; R-63, ¶¶ 1-5.) Around the same time, Plemmons learned that the Hotel's Night Auditor, Wanda Haden, had discovered that Petitioner Brown had accepted a personal check from a guest for payment of room charges in violation of Respondent's written policies and procedures. (R-62 ¶ 36.)

As a result of Petitioner Brown's failure to follow Respondent's policies and procedures, and the complaints lodged against Petitioner Brown by Hotel guests, Plemmons discharged Petitioner Brown, effective December 4, 2002. (R-62 ¶ 38; R-64, pp. 60-62.) Petitioner Brown filed an EEOC Charge on December 31, 2002 alleging that she had been discriminated against on the basis of her age and race with respect to her December 4, 2002 termination. (R-64, pp. 82-83, Ex. 5.)

C. Respondent Discharges Petitioner Amick For Poor Performance

Petitioner Amick, who was the Restaurant Manager prior to Respondent taking over the management of the Wyndham, was hired by Respondent. Under the new organizational structure, Petitioner Amick reported directly to Franco Brady ("Brady"), the new Food and

Beverage Director.[2] (R-62, pp. 56-59; R-65, ¶ 6.) Petitioner Amick was fifty-nine years old at the time Plemmons hired her. (R-65, p. 164.)

Under Respondent's management structure, Petitioner Amick was responsible for coordinating, supervising and directing all of the Restaurant's operations, including, but not limited to: responding to guest complaints; ensuring compliance with health and sanitation regulations; hiring, supervising, training, and scheduling the restaurant and room service staff and ensuring their compliance with the Hotel's attendance policies; maintaining the bar; maintaining high profitability and high quality product and service levels; reducing employee turnover; and maintaining revenue and payroll budgets. (R-65, p. 62, Ex. 3 and 4.) Soon after Respondent took over management of the Wyndham, Plemmons removed the bar from Petitioner Amick's duties in order to allow her to focus on improving the performance of the restaurant and room service. (R-65, 120; R-62 ¶ 40.)

Despite the reduction in her duties, Plemmons and Brady received reports that the restaurant was not functioning properly, including guest complaints about the freshness of the food and the timeliness of room service. (R-62 ¶¶ 42-44; R-65, pp. 63-67, Ex. 6.) On February 18, 2003, Brady issued Petitioner Amick a memo asking her to

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[2] Petitioner Amick first worked for the Wyndham between 1985 and 1992 when it was known as the Hilton. (R-65, pp. 33-38.) During that time period, Plemmons was the General Manager of the Hilton, and he promoted Petitioner Amick from Waitress to Restaurant Supervisor in 1988; from Restaurant Supervisor to Executive Housekeeper in 1990; and from Night Manager to Restaurant Manager in 1991. (R-65, pp. 35-38; R-62 ¶¶ 1-8.)

address several recurring issues concerning the poor attendance of her staff, the excessive use of overtime, and her failure to manage effectively. (R-65, pp. 68-72, Ex. 9.) A few days later, he also provided her with a list of concerns relating to the improper accounting procedures used by her staff. (R-65, pp. 76-82, Ex. 10.)

Petitioner Amick failed to correct any of the problems facing her department. Instead, she exacerbated the problem by taking time off from work on March 1 and 2, 2003 when the Hotel was sold out without first ensuring that the restaurant was adequately staffed. (R-65, pp. 83-85, Ex. 11.) Brady issued Petitioner Amick a series of memoranda between March 6, 2003 and April 25, 2003 delineating her deficiencies with respect to hiring, training, and supervising employees. (R-62 ¶¶ 42, 43; R-65, pp. 85-125, Ex. 12-14, 17-18, 20.) He also issued her a written disciplinary warning regarding her unacceptable performance on April 25, 2003. (R-65, 125-128, Ex. 20-21.)

On May 16, 2003, Plemmons met with Petitioner Amick and explained that Brady had reprimanded her at his direction because of the poor performance of the restaurant, including the high turnover rate among the staff, Petitioner Amick's poor leadership, and her failure to train her staff. Plemmons reiterated to Petitioner Amick that her job duties and responsibilities were reduced after Respondent took over management of the Hotel because of her poor performance and that she needed to consider whether she was going to improve her performance or whether Respondent would have to make some changes with respect to management of the restaurant. (R-65, pp. 131-132; R-62 ¶¶ 45-46.)

Between May 22 and May 29, 2003, Brady sent Petitioner Amick three more memos outlining her performance deficiencies. (R-65, pp. 135-146, Ex. 23, 25, 26.) During that same time period, he received two guest complaints regarding room service. (R-65, 22, 24.) When Petitioner Amick's performance still failed to improve, Plemmons decided to discharge her effective June 24, 2003 for failing to effectively manage the Restaurant. (R-65, pp. 147-154; R-62 ¶ 36.) Petitioner Amick accepted Respondent's offer to resign in lieu of being discharged. (R-65, pp. 157-158; R-62 ¶¶ 17, 35.) Petitioner Amick admits that Plemmons did not discriminate against her. (R-65, pp. 180-181.)

Petitioner Amick filed an EEOC Charge on September 12, 2003 alleging that she had been discharged because of her age. (R-65, 163, Ex. 30.)

III. COURSE OF PROCEEDINGS AND DISPOSITION BELOW

Petitioners Davis and Duncan filed separate Charges of Discrimination with the Equal Employment Opportunity Commission ("EEOC") against Respondent on November 19, 2002 asserting that they were unlawfully discharged on the basis of race. (R-31, Ex. A.) Petitioner Brown subsequently filed an EEOC Charge on December 31, 2002, making separate, individual claims of race and age discrimination against Respondent. (R-31, Ex. A.) None of the aforementioned charges contained allegations that the purported discrimination was class-wide or that claims were being asserted on behalf of anyone other than each individual charging party.

On January 27, 2003, Petitioners' counsel wrote a letter to the EEOC stating that Petitioners Davis, Duncan and Brown intended to amend the charges of discrimination they had filed, and asserting, for the first time, allegations of class-wide discrimination on the basis of race and age and individual claims of age discrimination on behalf of Petitioners Duncan and Davis. The letter was not verified, and neither Petitioners nor their counsel took any action to ensure that the charges were amended. Moreover, the EEOC never provided Respondent with notice of the purported January 27, 2003 "amendment." The EEOC issued Petitioners Davis, Duncan and Brown notices of their right to sue on July 21, 2003. (R-27, Ex. A.)

Petitioners Davis, Duncan and Brown filed the instant lawsuit on August 18, 2003. (R-1.) On February 10, 2004, the Petitioners amended their Complaint to add Petitioner Amick as a named plaintiff and to assert class claims of race and age discrimination on behalf of "approximately 40 similarly situated managers, Front Desk employees and other employees who have been terminated in their employment and discriminated in other terms and conditions of their employment on account of race and age at the Wyndham Hotel." (R-27.)

Respondent filed a motion to dismiss, *inter alia*, Petitioners' class-wide claims under the ADEA and Title VII. (R-30.) On June 10, 2004, the District Court entered an Order granting Respondent's motion to dismiss as to Petitioners' putative Title VII class action claims and Petitioner Duncan's individual age claim because she was under 40 at the time of her termination. (R-41.) On July 23, 2004, the District Court entered a second Order denying Petitioners' Motion for Class Certification on their Title VII class claims as moot. (R-42.) Petitioners filed an

Application for Interlocutory Appeal with the District Court on June 21, 2004 and an Application for Discretionary Appeal with the Eleventh Circuit on June 28, 2005. (R-43.) The Eleventh Circuit denied Petitioners' application on July 21, 2004, and the District Court denied Petitioners' application on August 17, 2004. (R-45, 46.)

Respondent filed four separate Motions for Summary Judgment seeking dismissal of Petitioners' remaining claims. (R-49, 52, 55 and 58.) On April 25, 2005, the District Court granted Respondent's Motions for Summary Judgment regarding the claims of Petitioners Duncan, Brown and Amick, but denied summary judgment on Petitioner Davis' individual claims of age and race discrimination on the grounds that Respondent failed to rehire her, a claim Petitioner Davis admits she never made. (R-85.) Respondent applied for an interlocutory appeal of the denial of summary judgment as to Petitioner Davis' claims, and its application was granted. (R-93, 100.) Petitioners Duncan, Brown and Amick also appealed the dismissal of their individual and class claims. (R-88, 97.) Petitioner Davis filed no appeal to the Eleventh Circuit.

On appeal, the Eleventh Circuit affirmed the District Court's denial of class certification and dismissal of Petitioners Duncan, Brown, and Amick's claims in an order dated November 13, 2006. (Pet. A-8 to A-13). The Eleventh Circuit held that the district court correctly dismissed Petitioners' class-wide discrimination claims because the EEOC charges did not provide notice that such claims were being asserted and a letter from Petitioner's counsel that attempted to amend the charges was ineffective as an amendment. (*Id.* at A-10). The Eleventh Circuit further held that summary judgment in Respondent's favor was properly granted on Petitioners' systemic treatment claims

because Petitioners failed to offer sufficient evidence of systemic disparate treatment. (*Id.* at A-11) Dismissal of Petitioners' disparate impact claims was affirmed because Petitioners had not identified a facially neutral policy that may have caused statistical disparities. The Eleventh Circuit also upheld the District Court's dismissal of Petitioners' individual disparate treatment claims because Petitioners Duncan and Amick did not present prima facie cases of discrimination and Petitioner Brown failed to rebut Respondent's legitimate nondiscriminatory reason for her termination with evidence of pretext. (*Id.* at A-11 to A-12).

In a separate order dated November 30, 2006, the Eleventh Circuit reversed the District Court's denial of Respondent's motion for summary judgment on Petitioner Davis' failure-to-hire claim, finding that Petitioner Davis had never asserted such a claim. (*Id.* at A-6).

Petitioners then filed the present motion for writ of certiorari.

REASONS FOR DENYING THE PETITION

The decisions below do not conflict with a decision of this Court or any Court of Appeals nor do they implicate a federal question that has not been decided by this Court. Accordingly, Petitioners have not carried their burden of demonstrating a "compelling reason" for the Petition to be granted. *See* Sup. Ct. R. 10.

I. The District Court Did Not Abuse Its Discretion in Denying Class Certification

District courts "have broad power and discretion vested in them by Federal Rule of Civil Procedure 23 with respect to matters involving certification and management of . . . class actions." *Reiter v. Sonotone Corp.*, 442 U.S. 330, 345 (1979). As a result, the denial of class certification is reviewed for abuse of discretion. *Califano v. Yamasaki*, 442 U.S. 682, 703 (1979). This highly deferential standard of review allows a range of choice for the district court, so long as that choice does not constitute a clear error of judgment. *See Kern v. TXO Prod. Corp.*, 738 F.2d 968, 971 (8th Cir. 1984) (abuse of discretion review "presupposes a zone of choice within which the trial courts may go either way"). Accordingly, even if this Court would have certified a class, that does not mean the district court abused its discretion in declining to do so. While the denial of certification is reviewed for abuse of discretion, Petitioners must also carry the significantly more strenuous burden of demonstrating that there are compelling reasons to grant the Petition. *See* Sup. Ct. R. 10 ("a petition for a writ of certiorari is rarely granted when the asserted error consists of erroneous factual findings or the misapplication of a properly stated rule of law"). Petitioners have not carried their burden because this is simply an unremarkable case in which the District Court exercised its considerable discretion under Rule 23 not to certify a class and the Eleventh Circuit upheld that decision.

The District Court did not abuse its discretion in denying class certification in this case on the ground that Petitioners did not assert class action allegations in their verified EEOC charges. First, the District Court correctly ruled that the original EEOC charges of Petitioners

Duncan and Davis did not put the EEOC or the Respondent on notice that allegations of class-wide discrimination should be investigated.

Further, the District Court properly held that because the original charges made no reference to class-wide discrimination, the letter of Petitioners' counsel, which first asserted such allegations, went beyond merely clarifying or amplifying the charges as allowed by 29 C.F.R. § 1601.12(b), and thus, was an improper amendment. *See Cheek v. W. and S. Life Ins. Co.,* 31 F.3d 497, 503 (7th Cir. 1994) (holding that amendments may not expand the scope of the allegations within a charge). Lastly, the District Court did not abuse its discretion in finding that counsel's letter, which was not verified, was ineffective to amend the charges. The Eleventh Circuit rightly affirmed the District Court's decision on this matter.

Petitioners have not demonstrated any basis warranting this Court's review of this issue. They argue, however, that their Petition should be granted because the Eleventh Circuit's opinion in this case overruled its previous precedent in *Grayson v. K-Mart*, 79 F.3d 1086 (11th Cir. 1996), and created a conflict with the Sixth Circuit's holding in *Howlett v. Holiday Inns, Inc.*, 49 F.3d 189 (6th Cir. 1995). No such conflict has been created.

In *Grayson*, the Eleventh Circuit considered whether the single filing (a.k.a. piggybacking) rule, which had already been applied to Title VII cases, should also be applied in ADEA cases. 79 F.3d at 1093. The court held that "[t]here is no reason why piggybacking should be allowed in Title VII cases but not in ADEA cases." 79 F.3d at 1102 (citing *Hoffman-LaRoche, Inc. v. Sperling*, 493 U.S. 165, 170 (1989)). The court further held that "[t]o

serve as the basis of an ADEA class action, the underlying EEOC charge must contain allegations(s) of class-wide discrimination." *Id.* at 1107 (citing *Anson v. Univ. of Texas Health Science Ctr.*, 962 F.2d 539, 541 (5th Cir. 1992)). "To make an allegation of classwide discrimination, 'there must be some indication that the grievance affects a group of individuals defined broadly enough to include those who seek to piggyback on the claim," and the charge must alert the EEOC that 'more is alleged than an isolated act of discrimination.'" *Id.* (quoting *Tolliver v. Xerox Corp.*, 918 F.2d 1052, 1058 (2d Cir. 1990)). Similarly, *Howlett* holds that "a charge will be adequate to support piggybacking under the single filing rule if it contains sufficient information to notify prospective defendants of their potential liability and permit the EEOC to attempt informal conciliation of the claims before a lawsuit is filed." 49 F.3d at 195.

The Eleventh Circuit's opinion in this case is consistent with both *Grayson* and *Howlett* in that it holds that the District Court's order denying class certification should be affirmed because the EEOC charges "failed to give adequate notice that an investigation of class-wide discrimination was relevant to Duncan and Brown's individual claims," and because counsel's letter attempting to amend the charges was ineffective. (Pet. at A-10.) In fact, both the District Court and the Eleventh Circuit cited *Grayson* in support of their conclusion. This case presents an instance of the application of a properly stated rule of law.

Accordingly, the District Court did not abuse its discretion in denying class certification and the Eleventh Circuit did not err in affirming this decision. Thus, Petitioners have not presented any compelling reason to grant their Petition to review the denial of class certification.

II. Petitioners' Systemic Treatment Claims Are Not Supported by the Evidence.

Before the District Court, Petitioners asserted a claim of systemic disparate treatment against Respondent. (R-27.) In support of their claim, Petitioners presented snapshots of the racial and age make-up of the management and front desk employees before and after Respondent took over the Wyndham Hotel. The District Court found this evidence to be insufficient to support the Petitioners' claims. (Pet. at A-34 to A-42).

Specifically, the District Court found the management employee snapshots to be inaccurate. (Pet. at A-37.) Petitioners omitted two African American employees, both over 40, from its after snapshot of managers employed by Respondent. (*Id.*) In addition, Petitioner represented two of the managers employed by Respondent after the take-over to be less than 40 years old at the time of their hire, when in fact they were over 40 years old at the time of hire. (*Id.*) Petitioners have asserted allegations of this same inaccurate evidence in their Petition.

Moreover, the District Court found both the management and front desk before and after snapshots to be of little probative value because Petitioners presented no evidence regarding the available labor pool or a statistical analysis of Respondent's hiring practices. (*Id.* at A-39.) Further, Petitioners offered no evidence of expected termination rates as compared to actual termination rates. (*Id.*) Nor did Petitioners present evidence of standard deviation. (*Id.*)

Acknowledging that a failure to present adequate statistical evidence is not alone fatal to a systemic disparate treatment claim, the District Court concluded that

Petitioners had simply not offered evidence that would allow a reasonable fact finder to find in their favor and entered summary judgment in Respondent's favor on this claim. (*Id.* at A-41 to A-42.) The Eleventh Circuit affirmed, holding that the Petitioners had not offered sufficient evidence to support their claim. (*Id.* at A-11.)

Petitioners now argue that the Eleventh Circuit's holding conflicts with this Court's decision in *Hazelwood School District v. United States*, 433 U.S. 299 (1977). This argument is without merit. In *Hazelwood*, this Court held that statistics relating to an employer's hiring practices after the enactment of Title VII should be considered in determining whether a prima facie case of discrimination exists. *Id.* at 313. The Court also considered what workforce comparisons are relevant to a prima facie case. *Id.* at 308 (finding comparison of percentage of minority teachers to percentage of minority students as opposed to comparison of minority teachers employed to minority teachers in workforce to be erroneous). Nothing in *Hazelwood*, however, suggests that the Petitioners have submitted sufficient evidence, statistical or otherwise, to support their systemic disparate treatment claim. Moreover, the statistical evidence presented in *Hazelwood* suffers from none of the inadequacies identified by the District Court in this case.

Throughout much of the remainder of their brief, Petitioners reargue the inaccurate facts they had already submitted to the District Court and to the Eleventh Circuit and contend that they should not be forced to present expert statistical evidence because they cannot afford to hire a statistician. Petitioners actually go so far as to assert that their statistical evidence presents "almost three hundred percent racial discrimination percentage

and a staggering seven hundred and fifty percent age discrimination percentage" without once addressing the inadequacies identified by the District Court. (Pet. at p. 20.) Respondent cannot even guess how Petitioners have derived these numbers. These arguments do not present a compelling reason to grant their Petition.

III. Petitioners Did Not Present Sufficient Evidence to Support Their Individual Disparate Treatment Claims

Petitioners have presented no compelling reason that review of the dismissal of their individual discrimination claims is warranted. Respondent will address each of the Petitioners' individual claims separately below.[3]

A. Petitioner Duncan

The District Court dismissed Petitioner Duncan's individual disparate treatment claim because she did not establish a prima facie case. (Pet. at A-50.) Specifically, her prima facie case failed because the evidence showed that Petitioner Duncan was replaced by an African American woman over the age of 40 who was also qualified for the position. (*Id.*) *See McDonnell-Douglas Corp. v. Green*, 411 U.S. 792 (1973). Petitioner Duncan does not contest this fact in the Petition. There is no compelling reason for the Court to review this matter.

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[3] Again, Petitioner Davis did not appeal the District Court's dismissal of her individual disparate treatment claim based on her discharge. Accordingly, the dismissal of Petitioner Davis' discharge claim is not before the Court.

B. Petitioner Brown

Petitioner Brown established a prima facie case of disparate treatment before the District Court, but was unable to rebut Respondent's legitimate nondiscriminatory reason for terminating her with evidence of pretext. (Pet. at A-52 to A-54.) Petitioner Brown was terminated based on repeated complaints that she had been rude to patrons and for violating a company policy against the acceptance of personal checks for room charges. (R-62 ¶¶ 36-37, R-63 ¶¶ 1-5.) Petitioner Brown now asserts the same evidence of pretext that she asserted before the District Court. First, she states that a white employee, Amanda Fox, also accepted a check,[4] but was not fired. Petitioner Brown presents no evidence, however, that management had also received complaints that Fox was rude to customers.

As further evidence of pretext, Petitioner Brown asserts that Rooms Executive Bruce Raines stated to an employee that she had the "right look" that the hotel's management wanted. (R-69 Ex. B.) No explanation was given as to what the "right look" meant. (*Id.*) Petitioners contend that the "right look" meant young and white. (Pet. at p. 20.) Petitioners fail to point out, however, that the women to whom this statement was made were, in fact, African American. (Pet. A-20).

Petitioners argue that the District Court's failure to consider the "right look" statement as evidence of pretext is erroneous in light of this Court's recent rejection of the

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[4] Petitioner Brown actually asserts in her Petition that Fox accepted a personal check, though the evidence does not support this contention. *See* Pet. A-53-54 fn. 7. Petitioner Brown cites to no evidence in the record to support any of these contentions.

Eleventh Circuit's "slap you in the face" standard of pretext set forth in *Ash v. Tyson Foods*, 126 S. Ct. 1195, 1197, 546 U.S. 454, __ (2006). But the District Court did not employ this standard in determining whether the "right look" comment was probative of pretext. This Court in *Ash* reached no conclusions about whether the evidence in that case was sufficient to show pretext. *Id.* at 1198. Petitioners have made no convincing argument that the evidence here shows pretext. There is simply no compelling reason for the Court to review this matter.

C. Petitioner Amick

Like Petitioner Duncan, Petitioner Amick also failed to establish a prima facie case of disparate treatment because she presented no evidence that she was replaced by someone outside the protected class. (Pet. A-55.) Petitioner Amick has claimed that two women under the age of 40 were hired to replace her. As the District Court noted, however, Respondent presented credible evidence that the Restaurant Manager position Petitioner Amick held was eliminated, with Food and Beverage Director Franco Brady taking over the management of the restaurant. (*Id.*) Two younger women were hired before Petitioner Amick's termination, but no evidence was presented that these women took over Petitioner Amick's job responsibilities. (*Id.*) Accordingly, the District Court held that a prima facie case had not been established. (*Id.*) The Eleventh Circuit affirmed.

The District Court further opined that Petitioner Amick did not sufficiently rebut Respondent's evidence that she was terminated because of well-documented concerns about her performance, which included understaffing, excessive use of overtime by staff, high turnover of staff, lack of staff training,

improper accounting procedures, and issues with food quality. (Pet. A-55 to A-57.) Petitioner Amick responds to these legitimate nondiscriminatory reasons for her discharge with only her own conclusory allegations that they are false. Petitioner Amick further denies that she had responsibility for hiring staff and thus, she should not have been held responsible for issues relating to understaffing. (Pet. 13-14.). Petitioner Amick, however, had admitted in her own deposition testimony that she was responsible for hiring. (R-65 pp. 117-25; Pet. A-57 fn. 8.)

Petitioner Amick has presented no compelling reason for the Court to review this matter.

IV. Petitioner Davis Admits She Asserted No Failure-to-Hire Claim

The District Court granted Respondent's motion for summary judgment on Petitioner Davis' discriminatory discharge claim because she failed to present evidence that she was replaced by someone outside the protected class. (Pet. A-43 to A-48.) The District Court then proceeded, however, to consider whether Petitioner Davis had established a failure-to-hire claim. (*Id.*) Finding that she had, the District Court denied Respondent's summary judgment motion with respect to this one claim. (*Id.*)

Respondent filed an interlocutory appeal for the Eleventh Circuit to consider this matter. The Eleventh Circuit reversed, holding that Petitioner Davis had never raised a failure-to-hire claim. (Pet. A-6 to A-7.) Petitioner Davis has never refuted this fact. There is no compelling reason for the Court to review this matter.

CONCLUSION

The decisions below do not conflict with any decision of this Court or any Court of Appeals nor do they implicate an important federal question that has not be decided by this Court. Accordingly, Petitioners have not carried their burden of demonstrating a compelling reason for the Petition to be granted. The Petition should therefore be denied.

Respectfully submitted,

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